The status of dependent outlying archipelagos in international law

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A dissertation submitted to the University of Bristol in accordance with the requirements of the degree of Doctor of Philosophy in the Faculty of Social Sciences and Law

School of Law, April 2008

ABSTRACT

The creation of a legal framework governing archipelagic states has been an important innovation of the 1982 United Nations Convention on the Law of the Sea (LOSC). Part IV of this Convention confers upon such states the right to draw archipelagic baselines joining the outermost points of their archipelagos and to exercise sovereignty over the enclosed waters. However, the LOSC grants this right only to 'archipelagic states', which are defined as states 'constituted wholly by one or more archipelagos'. Dependent outlying archipelagos may not benefit from the application of this special protective regime since they do not fall within the purview of the Convention's definition of archipelagic states. Thus, the question of the legal regime applicable to dependent outlying archipelagos arises.

This thesis examines the status of dependent outlying archipelagos in international law. The examination of this question is twofold. At first, the provisions of the Law of the Sea Convention are examined with a view to ascertaining whether archipelagic needs and interests may be satisfied on the basis of its existing and more generally applicable provisions. It is argued that the provisions of the LOSC – with the exception of the potential application of article 7 on straight baselines - are insufficient to deal effectively with archipelagos and to safeguard their interests and needs. Furthermore, Article 7 of the LOSC is assessed in order to establish whether and under which conditions this provision may be applied to dependent outlying archipelagos.

The thesis focuses next on the practice of continental states in their outlying archipelagos and assesses its contribution to the evolution of international law. Firstly, the possibility of the existence of special rules of customary international law concerning particular cases of State practice is examined. It is argued that such rules exist for the Faroe and the Galapagos Islands. Furthermore, the question of the current status of general customary law with regard to dependent outlying archipelagos is addressed. This thesis advocates the position that State practice has led to an emerging customary rule providing for the application of straight baselines to groups of islands. This rule concerns small archipelagic formations, in which the islands are located at close distance to each other. With regard to archipelagos scattered in a broad maritime space, this thesis concludes by suggesting that the application of the archipelagic regime prescribed in the LOSC could provide a feasible solution accommodating both the interests of archipelagos and those of the international community.

ACKNOWLEDGMENTS

First of all, I would like to express my sincere gratitude to my supervisor, Professor Malcolm Evans, for his patient guidance and invaluable advice throughout this study.

I am also grateful to Professor Antonios Bredimas of the Law School, University of Athens, for his very useful comments and advice on various aspects of the thesis.

I would like to thank Dr Robin Cleverly of the UK Hydrographic Office for providing me with information and answering my questions regarding technical issues of my study.

Many thanks to the staff of the Wills Memorial Library for their support and for providing an ideal working environment.

I would also like to express my sincere thanks to my fellow PhD students and friends at the University of Bristol for their support and kind help and advice with my research. I would also like to thank my friends both in Bristol and in Athens for their encouragement and support.

I am also grateful to my scholarship sponsor, the Greek State Scholarship's Foundation (IKY), which awarded me a full scholarship for my PhD in the UK. Many thanks also to Mrs Adamopoulou from IKY for always being kind and helpful with my enquiries.

Last but not least, I would like to thank my family, especially my parents and my sister, for their continuous encouragement and support.

AUTHOR'S DECLARATION

I declare that the work in this dissertation was carried out in accordance with the Regulations of the University of Bristol. The work is original, except where indicated by special reference in the text, and no part of the dissertation has been submitted for any other academic award. Any views expressed in the dissertation are those of the author.

Signed: 

Date: 20/03/09

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LIST OF ABBREVIATIONS

AJIL	American Journal of International Law
AFDI	Annuaire Français de Droit International
BYIL	British Yearbook of International Law
Can.YIL	Canadian Yearbook of International Law
EEZ	Exclusive Economic Zone
EFZ	Exclusive Fishing Zone
GA	General Assembly
GYIL	German Yearbook of International Law
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
ILA	International Law Association
ILC	International Law Commission
ILCYB	International Law Commission Yearbook
ILM	International Legal Materials
ILR	International Law Reports
IJECL	International Journal of Estuarine and Coastal Law
IJMCL	International Journal of Marine and Coastal Law
IMO	International Maritime Organisation
LN	League of Nations
LOSC	Law of the Sea Convention
LSB	Law of the Sea Bulletin
LTE	Low Tide Elevation

MP	Marine Policy
MSC	Maritime Safety Committee
NILR	Netherlands International Law Review
NYIL	Netherlands Yearbook of International Law
ODIL	Ocean Development of International Law
Off.Rec.	Official Records
PCIJ	Permanent Court of International Justice
PSSA	Particularly Sensitive Sea Area
RGDIP	Revue General de Droit International Public
Span.YIL	Spanish Yearbook of International Law
UN	United Nations
UNCLOS	United Nations Conference on the Law of the Sea
UNESCO	United Nations Education Social and Culture Organisation
VJIL	Virginia Journal of International Law

INTRODUCTION

I. Archipelagos, the archipelagic concept and the archipelagic regime: specification of the problem

The word archipelago, etymologically deriving from the Greek words 'arkhin' (*αρχήν* meaning chief, principal) and 'pelagos' (*πέλαγος* meaning the sea), was originally used in Italian as 'arcipelago' to denote the Aegean Sea.[1] This sea-based concept was evident in the initial meaning of the word as a 'sea studded with islands'.[2] This meaning has evolved over time and the word archipelago is, nowadays, commonly used to refer to a group or chain or cluster of islands.[3] The initial definition of the word archipelago reflects, however, the basic attribute of this geographical feature, namely the close association and interdependence between the land and the sea. In this sense, the sea cannot be seen as an element separating the islands, as one would expect, but one connecting them.

This interdependence between the land and the sea was considered to merit special protection in the law of the sea. In particular, it was thought that archipelagos present exceptional circumstances justifying a deviation from the traditional rule which provided for the measurement of the territorial sea from the coast of each individual island.[4] Various reasons were advanced as a justification for the special treatment of archipelagos in international law. Geographic realities, particularly the fact that archipelagos are encircled and penetrated by the sea and that they form a natural geographical and geomorphologic unity, were invoked as the main reason justifying a special treatment for archipelagos. Geography was considered to be a source of various

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[1] The word 'archipelago' (αρχιπέλαγο) does not occur in ancient or Medieval Greek and is considered a loan from the Italian compound. See The *Oxford English Dictionary* (2nd ed.) prepared by J.A.Simpson & E.S.C.Weiner (Oxford: Clarendon Press, 1989). In the *Collins English Dictionary* it is suggested that the Italian word 'arcipelago' may have been originally used as a mistranslation of the Greek Aigaion pelagos (in Latin Egeopelagus); the Oxford English Dictionary suggests that this is unlikely.

[2] *The Houghton Mifflin Dictionary of Geography: Places and Peoples of the world* (Boston, New York: Houghton Mifflin Publ., 1997); A.N.Clark, *The Penguin Dictionary of Geography* (3rd ed) (London: Penguin Books, 2003); *Philip's Geography Dictionary* (2nd ed) (London: George Philip LtD, 2000); Susan Mayhew, *Oxford Dictionary of Geography* (Oxford: Oxford University Press, 2004); T.&A.Goudie, *The Dictionary of Physical Geography* (Oxford: Blackwell Publ., 2000).

[3] *Ibid.* It is mentioned in Longman Glossary of Geographical Terms that the original notion of the island-studded sea is, nowadays obsolete; D.Stamp & A.N.Clark (eds), *A Glossary of Geographical Terms* (London: Longman Ltd, 1979).

[4] See R.D.Hodgson, 'Islands, Normal and Special Circumstances', Department of State Research Study (1973), p. 28 et seq.; R.D.Hodgson and L.M.Alexander: *Towards an objective analysis of special circumstances*, Occ. Paper No. 13 (Law of the Sea Institute, University of Rhode Island, 1972), p. 45.

concerns, which were to be addressed through the attribution of a special sovereign regime to the waters of the archipelago. These concerns, as presented by archipelagic claimants, related to economic considerations (particularly exploitation of the marine natural resources upon which the population of the archipelago is dependent), security and political preoccupations and environmental considerations referring to the protection of the vulnerable marine ecosystem.[5]

The solution suggested to address the problems created by the geographic particularities of archipelagos and to provide a feasible solution for their protection, was based on the unitary concept for archipelagos according to which both the land of the islands and the waters between and around them would be considered as a unified whole. This objective would be attained through the use of straight baselines joining the outermost points of the archipelago. The maritime zones would be measured from these baselines and the enclosed waters would have a uniform regime where the state would exercise sovereignty.

The main problem encountered by archipelagic claimants in their attempts to have the archipelagic concept recognised as a rule of the law of the sea concerned the fact that the application of the archipelagic concept was in apparent opposition to the interests of maritime powers regarding freedom of navigation and other uses of the seas. Indeed, the rules of the international law of the sea are the product of a continuing conflict between states' interests, which may be summarised in the tension between the principles of *mare clausum* and *mare liberum*.[6] The archipelagic concept is a manifestation of the former principle as it aims at excluding third states' vessels from the waters of the archipelago,[7] reducing thus the area of the high seas where the freedom of navigation is normally exercised.

A further problem encountered by the proponents of the archipelagic concept concerned the 'rendering' into legal terms of the geographic particularities presented by

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[5] These reasons are further explored in Chapter 1, p. 39 *et seq.*.

[6] The international law of the sea has its foundation on the conflict between the two perceptions of *mare clausum* and *mare liberum*; it has been suggested that nowadays with the adoption of the LOSC and the recognition of enhanced jurisdiction in favour of the coastal state in its off-shore waters, the first principle has gained ground over the second. Dubner's study on archipelagos is based on the premise of the conflict between special and general interests in the waters of archipelagos; B.Dubner, *The law of territorial waters of midocean archipelagos and archipelagic states* (The Hague: Martinus Nijhoff, 1976).

[7] Marston mentions that Selden, the famous author of the seventeenth century classic *Mare Clausum* would approve the enhanced jurisdiction within and around a group of islands; G.Marston, 'International Law and Midocean Archipelagos', 4 *Annales d' Etudes Internationales* (1973), p. 171.

the various types of archipelagos.[8] Whereas exceptional geographic realities were the *raison d'être* of the archipelagic concept, geography composed also one of the main reasons impeding its acceptance by the international community. It is true that archipelagos take various forms being composed of small, large, few or many islands and being arranged in different patterns.[9] This geographical multiformity hampered the formulation and adoption of legal rules which could regulate uniformly the various types of archipelagos. In this respect, archipelagic solutions addressed the following questions: (a) which archipelagos should benefit from the archipelagic regime and (b) what the conditions of its application and its content should be. It is not surprising that the problem of midocean archipelagos was characterised by one commentator as one of the most difficult problems and a 'monumental challenge' in the development of the law of the sea because of the diversity in geographical features and 'the complexities of geopolitics, economics, security interests and a myriad of attendant factors'.[10]

In order to confront these challenges, the efforts of states and legal scholars were centred on the 'transformation' of geographic particularities into juridical concepts and the reconciliation of conflicting state interests. The outcome of this lengthy and cumbersome procedure was Part IV of the Law of the Sea Convention (LOSC), which was adopted in 1982 upon the closure of the Third Conference on the Law of the Sea and came into force in 1994. However, the archipelagic regime of the LOSC was restricted to archipelagic states (a notion unknown before the Third Conference on the Law of the Sea), which were defined as states being composed wholly by one or more archipelagos. Therefore, archipelagos which form part of a continental state were not included in the special regime adopted by the LOSC.

The archipelagic regime as provided for in the LOSC has been criticised as falling short of the aspirations of archipelagic states and states possessing outlying

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[8] Characteristically, Gidel stated that 'la notion juridique d'archipel est ... d'une construction extrêmement difficile et peut-être même impossible', G.Gidel, *Le Droit International Public de la Mer: Le Temps de Paix de la mer, T. III: La Mer Territorial et la Zone Contigue* (Paris; Sirey, 1934), p. 707; see also Boggs, 'Delimitation of the Territorial Sea' 24 *AJIL* (1930), p. 541; R.D.Hodgson & L.M.Alexander (1972), p. 45: 'outlying archipelagos are more difficult to handle, first because they exhibit such a wide variety of physical conditions and second because it may be very difficult to decide the conditions under which they merit a special juridical regime'.

[9] M.Munavvar, *Ocean States: Archipelagic Regimes in the Law of the Sea* (Dordrecht: Martinus Nijhoff Publ., 1995), p. 5; See Bowett for the variety of forms of 'oceanic' archipelagos: D.W.Bowett, *The Legal Regime of Islands* (New York: Oceana Publications Inc, 1979), p. 90-7; L.Lucchini & M.Voelckel, *Droit de la mer: La mer et son droit; Les espaces maritimes* (Paris: Pedone, 1990), p. 357-8; see also R.D.Hodgson (1973), p. 6.

[10] H.W.Jayawardene, *The Regime of Islands in International Law* (Dordrecht: Martinus Nijhoff Publ., 1990), p. 103.

archipelagos.[11] What is more, as this thesis argues, the LOSC has not resolved comprehensively the archipelagic problem, since the geographic particularities of the various archipelagos were disregarded and what is more, an important category of archipelagos, namely dependent outlying archipelagos, has been excluded from any special regime.

This has not prevented, however, a number of continental states from applying a straight baseline system to their archipelagos or parts of them for the delimitation of the maritime zones. Denmark and Ecuador were the first states of the international community to raise archipelagic claims for the Faroe and Galapagos Islands respectively. Other states such as Australia (Furneaux Group, Houtman and Abrolhos Islands), Spain (Canary, Balearic Islands), Portugal (Madeira and Azores), the UK (Falkland Islands, Turks & Caicos), France (Guadeloupe, Loyalty Islands), Norway (Svalbard archipelago) have also applied similar systems. This practice will be considered in detail later in this thesis.

Is, however, the question of archipelagos an issue of importance nowadays? If one examines the publications regarding archipelagos one would note that there was a proliferation of articles and studies on this issue during the 1970s, most of which were advocating the special nature of archipelagos and were arguing for the adoption of a special regime for them.[12] This proliferation of studies was justified primarily on the basis of the uncertainty of international law regarding – among other issues - the measurement of maritime zones of groups of islands, particularly as the Third Conference on the Law of the Sea had just commenced its work. The interest of international authors (or at least the publications on the issue) decreased after the adoption of the archipelagic regime for archipelagic states. Most of the studies following the adoption of the LOSC refer to the archipelagic regime as prescribed in the LOSC and as applied in practice.[13] All these studies make also reference to the practice

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[11] M.Munavvar (1995), p. 3. Archipelagic states had to accept concessions upon the sovereign regime of their archipelagic waters in favour of interests of passage by third states' vessels and aircrafts; see Chapter 1, p. 32 *et seq.*.

[12] See, for example, M.Kusumaatmadja, 'The Legal Regime of Archipelagos: Problems and Issues', in Lewis M. Alexander (ed), *The Law of the Sea: Needs and Interests of Developing Countries: Proceedings of the Seventh Annual Conference of the Law of the Sea Institute University of Rhode Island* (Kingston: University of Rhode Island, 1973), p. 166 *et seq.*; R.P.Anand, 'Midocean Archipelagos in International Law: Theory and Practice' 19 *Indian Journal of International Law* (1979), p. 228 *et seq.*; M.Defensor Santiago, 'The archipelagic concept in the Law of the Sea', 49 *Philippine Law Journal* (1974), p. 315 *et seq.*.

[13] See, for example, M.Munavvar (1995); B.Kwiatkowska, 'The archipelagic regime in Practice in the Philippines and Indonesia – Making or Breaking Law?', 6 *IJMCL* (1991), p. 1 *et seq.*; L.L. Herman, 'The modern concept of the off-lying archipelago in international law', XXIII *Can.YIL* (1985), p. 172 *et seq.*.

of continental states possessing an archipelago but they are restricted to an enumeration of some of the cases with the comment that the archipelagic regime as prescribed by the LOSC is not applicable to dependent midocean archipelagos. It should be, however, noted that some of these studies leave open the discussion or even the possibility of the evolution of such a regime for dependent outlying archipelagos.[14] The status of dependent outlying archipelagos in international law, particularly with regard to the baseline system to be applied[15] and the juridical regime of the waters inside the archipelago,[16] remains uncertain and this specialised study is intended to shed some light on this issue.

II. The limits of the thesis: Clarification of definitional aspects

Before presenting the scope of this thesis, it is necessary to clarify some definitional aspects of the subject and particularly to elucidate the notion of dependent outlying archipelagos.

As mentioned at the beginning of this introduction, an archipelago, despite its original meaning of an island-studded sea, has been accepted to refer to a group, chain or cluster of islands.[17] This vague geographic definition raises various issues. The first regards the number of the islands. May a group of two islands be characterised as an archipelago? This issue is disputed among authors. Evensen, for example, argued that an archipelago may be composed of two or more islands.[18] On the contrary, Hodgson suggested that archipelagos should include a 'substantial number' of islands.[19] In the legal definition of an archipelago prescribed by the LOSC[20] there is no limitation with

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[14] B.Kwiatkowska (1991), p. 23; J.R.V.Prescott, *The Maritime Political Boundaries of the World* (London: Methuen, 1985), p. 213; E.D.Brown, *The International Law of the Sea Introductory Manual* Vol. I (Aldershot: Dartmouth Publ., 1994), p. 124.

[15] The baselines for the measurement of the maritime zones is fundamental for the law of the sea because, as noted by Rodgers, 'different results can be obtained depending upon what is chosen as the point or line from which the breadth is measured'; P.E.Rodgers, *Midocean Archipelagos and International Law* (New York: Vantage Press, 1981), p. xviii.

[16] The use of straight baselines alters the juridical regime of the enclosed waters with regard to the jurisdiction of the coastal state and the rights exercised therein by other states.

[17] See *supra* note 2.

[18] J.Evensen, 'Certain Legal Aspects concerning the Delimitation of the Territorial Waters of Archipelagos', which was included as Preparatory Document for UNCLOS I in 1957. UNCLOS I Off. Rec., Vol. I, Preparatory Documents, Geneva 1958, Doc. A/CONF.13/18, p. 290. Similarly, C.R.Symmons, *The Maritime Zones of Islands in International Law* (The Hague: Martinus Nijhoff Publ., 1979), p. 61; J.R.Coquia, 'The Territorial Waters of Archipelagos', 1 *Philippine International Law Journal* (1962), p. 141.

[19] R.D.Hodgson (1973), p. 27.

[20] Article 46 (b) partly reads: 'archipelago means a group of islands, including parts of islands, interconnecting waters and other natural features'.

regard to the number of islands and this provision has been arguably interpreted to connote that even two islands may be validly regarded as an archipelago.[21] This thesis accepts the latter interpretation as valid and considers groups of two islands as archipelagos.

Another issue concerns the definition of islands. Article 121 of the LOSC defines an island as 'a naturally formed area of land, surrounded by water, which is above water at high tide'. In this respect, artificial islands and low-tide elevations are excluded. It is, however, problematic whether islands should be interpreted as excluding rocks as defined in article 121 (3) of the LOSC.[22] The archipelagic definition embodied in the LOSC takes into consideration the variety of natural features included in archipelagic formations by providing that 'archipelago means a group of islands including parts of islands, interconnecting waters and other natural features'. Rocks may indeed be included within the archipelagic formation but it appears that for the application of the archipelagic regime as prescribed in Part IV of the LOSC, an archipelago cannot be composed solely of rocks. This interpretation stems from article 46 (2) which stipulates that the archipelago should form an economic and political entity. A group of rocks which cannot sustain human habitation or economic life of their own cannot be considered as an economic or political entity. However, some implications arising from the existence of rocks within an archipelagic formation are addressed in this thesis.

Moreover, the archipelagic definition in article 46 (b) of the LOSC does not refer to the distance between the islands or to the area of the sea they are to cover. Nevertheless, a degree of adjacency or compactness of the islands, which is of great importance for the archipelagic concept,[23] is inherent in the words 'group, chain, and cluster'. Hodgson and Alexander referred to the factor of adjacency as a key element for

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[21] M.Munavvar (1995), p. 110-111. Francois, the Special Rapporteur of the ILC suggested that the group of islands 'shall be determined to mean three or more islands' (UN Doc.A/CN.4/77, Third Report by Mr. J.P.A. Francois, Special Rapporteur on the Regime of the Territorial Sea *ILCYB*, 1954, Vol. II, (New York: United Nations Publ., 1960), p. 5); Lastly, the UK in its draft articles in the Sea-Bed Committee had proposed that the group of islands should be composed of three or more islands; see GA Off.Rec., Twenty-eighth Session, Suppl. No 21 (A/9021), Vol. III, Annex II, Appendix V, Chapter 33 (originally issued as A/AC.138/SC.II/L.44), p. 99; nevertheless, such a restriction was not adopted in the LOSC. The non-inclusion of such a provision may be indicative of the fact that groups of two islands may compose an archipelago in the legal sense. The archipelago may comprise other geographical features such as rocks, low-tide elevations etc (article 46 (2) of the LOSC).

[22] Article 121 (3) of the LOSC provides: 'Rocks which cannot sustain human habitation or economic liefe of their own shall have no exclusive economic zone or continental shelf'.

[23] M.Munavvar (1995), p. 109. Fizmaurice also points out that 'a group (of islands) implies closely connected units, where the extent of land is fairly high in proportion to that of the intervening spaces of sea', G.Fitzmaurice, 'Some Results of the Geneva Conference on the law of the Sea', (8) *ICLQ* (1959), p. 88.

the recognition of an archipelago: 'If the islands, islets or rocks are located at a considerable distance from one another, then the inter island waters are hardly adjacent to the land'.[24]

Related to the last remarks are the complications incurred by the great variety of archipelagic features. Archipelagos indeed take various forms being composed of small, large, few or many islands and being arranged in different patterns.[25] Dubner discerned three categories on the basis of the size of the archipelago or more appropriately on the basis of the maritime space covered by it, which will be also used in the present thesis. These categories are the following:

'(1) The islands are scattered, at random, over a radius of more than twice the breadth of the territorial sea and are not grouped together in any particular pattern. In this situation, there occurs wide areas of high seas between the islands.

(2) The islands are not scattered over a large distance. Instead, they are grouped together, at random, with smaller areas of high seas flowing between the islands.

(3) There is one large mainland-type island with a few islands located within a close proximity both to the large island and to the other fringe islands. In this situation, the total square miles of high seas flowing between all of the islands is less than the total square miles of inland mass'.[26]

The implications of the application of the archipelagic concept to each one of these three categories of archipelagos are discussed in the present thesis. This thesis argues in particular that the geographical realities of archipelagos should be – and to a certain degree have been - taken into account in the determination of the special regime to be applied to the various types of archipelagos.

The term 'dependent' refers to archipelagos which form part of a continental state. Part IV of the LOSC provides for the application of the archipelagic regime to archipelagic states, which are defined as states constituted wholly by one or more archipelagos. States possessing outlying archipelagos cannot be characterised as archipelagic as they are primarily composed of a mainland. Moreover, dependent outlying archipelagos are not states but constitute parts of a sovereign state.[27] The term

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[24] R.D.Hodgson & L.M.Alexander (1972), p. 45.
[25] See *supra* note 9.
[26] B.H.Dubner (1976), p. 67-8.
[27] The notion of dependency indicates, according to Brownlie, among other situations 'the absence of statehood, where the entity concerned is subordinated to a state so completely as to be within its control'; I.Brownlie, *Principles of Public International Law* (6th ed) (Oxford: Oxford University Press, 2003), p. 73. But even if a dependent archipelago has a margin of autonomy or self-governance, it cannot qualify as

'dependent' has been considered as preferable to other names used for this type of archipelagos such as 'non-state'[28] or 'state'[29] archipelagos, as it best reflects the lack of statehood, which is the differentiating element between these archipelagos and archipelagic states.[30]

The term 'outlying' refers to archipelagos which are not located close to a coast but at a distance from it. Outlying archipelagos have also been referred to as 'midocean', 'non-coastal' or 'non-adjacent';[31] these terms, which reflect the autonomy of the archipelagic feature from the coast of the state of which it forms part, are used interchangeably in the present thesis.[32]

In the determination of an archipelago as outlying geo-political factors should be taken into consideration. [33] In this respect, an archipelago may be outlying even if it is located in close proximity to a coast provided that this archipelago belongs to a different state than the coastal state.

The second issue which should be considered concerns the question of how far from the coast of the state the archipelago should be located so as to be considered as outlying; in other words, what are the criteria determining when an archipelago may be classified as outlying or coastal. Bowett connects the characterisation of an archipelago as outlying or coastal with the application of article 4 of the TSC (article 7 of the LOSC): 'where an island or group of islands lies offshore, but in such a geographical relationship to the mainland that a single straight baseline system would not be

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an archipelagic state as it lacks the element of sovereignty, which is determined by the capacity of a state to govern entirely its international relations. The concept of independence or sovereignty, as reflected in the capacity to enter into relations with other states, is considered as the decisive criterion of statehood. See article 1 of the Montevideo Convention on Rights and Duties of States: 'the state as a person of international law should possess the following qualification: (a) permanent population, (b) a defined territory, (c) government and (d) the capacity to enter into relations with other states'; Hudson, *International Legislation*, Vol. VI, p. 620.

[28] E.D.Brown (1994), p. 123. B.Kwiatkowska (1991), p. 6; she also refers to the category of 'non-self-governing archipelagic territories', *ibid*, p. 4.

[29] H.W.Jayawardene (1990), p. 104. Rodgers refers to the continental states possessing archipelagos as 'mixed' states: P.E.J.Rodgers (1981), p. 178; the same M.A.Saenz de Santa Maria, 'Spain and the law of the Sea: Selected Problems' 32 *Archiv des Völkerrechts* (1994), p. 208-212. Mani refers to them as 'archipelagian states'; V.S.Mani, 'National Jurisdiction: Islands and archipelagos' in R.P.Anand (ed), *Law of the Sea: Caracas and Beyond* (The Hague: Martinus Nijhoff, 1980), p. 97-98.

[30] M.Munavvar (1995), p. 126; E.D.Brown (1994), p. 107-109.

[31] The term 'non-adjacent' was used by M.S.McDougal and W.T.Burke, *The public order of the Oceans: a contemporary international law of the sea* (New Haven ; London : Yale University Press, 1962), p. 411.

[32] See Brown who refers to this category of archipelagos as 'midocean' or 'oceanic' or 'outlying' archipelagos, p. 124; see also G.Marston (1973), p. 172. Churchill and Lowe refer to them as 'non-coastal': R.R.Churchill & A.V.Lowe, *The Law of the Sea* (3rd Ed.) (Manchester, Manchester University Press, 1999), p. 120; D.W.Bowett (1979) as 'oceanic', p. 90.

[33] H.W.Jayawardene (1990), p. 104: Jayawardene points out that 'the classification being legal in character, the relevant geo-political considerations must necessarily be taken account of in the process of identification.'

permissible because it would contravene the conditions of article 4 relating to the general direction of the coast or the subjection of the waters to the regime of internal waters, such islands do not qualify as true 'coastal archipelagos'.[34] Evensen employs, however, a vaguer definition based on the autonomy of the group: 'Outlying (midocean) archipelagos are groups of islands situated out in the ocean at such a distance from the coasts of firm land as to be considered as an independent whole rather than forming part of the outer coastline of the mainland'.[35] The distinction between coastal and outlying archipelagos is even more problematic in the case of an archipelago dominated by a mainland-type island surrounded by smaller fringing islands. The implications of the application of the archipelagic concept in these cases are explored in Chapter 3.[36]

It should be borne in mind, however, that the archipelagic concept was conceived as being applicable to both types of archipelagos and initially the solution to the archipelagic problem was common for both categories. Acknowledging the difficulty in drawing a sharp distinction between coastal and outlying archipelagos in some instances,[37] it should be accepted that each particular case must be treated on the basis of its own merits and according to the particular geographical and other factors affecting its characterisation as either coastal or outlying.

III. The scope and methodology of the thesis

This thesis attempts to show the deficiencies of the treatment of archipelagos in the Law of the Sea Convention by examining the case of dependent outlying archipelagos, a category of archipelagos not included in the special protective regime prescribed by the LOSC. This thesis argues that the treatment of archipelagos in the LOSC is problematic in two ways: firstly, Part IV of the LOSC draws a distinction among archipelagos on the basis of their political status, restricting the ambit of the application of the archipelagic regime to archipelagic states, namely states constituted wholly by archipelagos, and secondly it disregards the geographic particularities presented by archipelagos. In particular, it is argued that distinguishing archipelagos on

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[34] D.W.Bowett (1979), p. 90. See also G.Marston, (1973) p. 172. Argentina's statement, UNCLOS III Off.Rec., 7th Meeting, para. 84: 'when distinguishing the so-called coastal archipelagos situated in close proximity to the coast, it was necessary to take into account the following considerations: first, that distinction related to the question of drawing the straight baselines used to measure the territorial sea of a state; and secondly, the drawing of such baselines was governed by certain requirements, most of which were contained in the 1958 Geneva Convention on the Territorial Sea and Contiguous Zone ...'.

[35] J.Evensen (1958), p. 290.

[36] See Chapter 3, p. 119 *et seq*..

[37] G.Marston (1973), p. 172.

the basis of their political status is arbitrary in the sense that all types of archipelagos, regardless of whether they belong to a continental state or form an independent state, share the same needs and interests which stem from their geographical circumstances. The application of the archipelagic concept consisting in the encirclement of the archipelagos with straight baselines and the unification of the enclosed waters in a sovereign regime should be common for all archipelagos. Geographic particularities should, however, be taken into account in the formulation of a special regime for archipelagos with respect to the regime of the enclosed waters particularly concerning the rights enjoyed therein by third states. The archipelagic problem is thus reappraised with a focus on the status of dependent outlying archipelagos in international law.

This thesis examines the archipelagic problem and particularly the problem concerning dependent outlying archipelagos from a dual perspective. At first, the Law of the Sea Convention (LOSC) is examined with a view to ascertaining whether archipelagic needs and interests may be satisfied on the basis of its existing and more generally applicable provisions. In this sense, two issues are treated: firstly, this thesis addresses the question of whether the various zones of enhanced coastal jurisdiction as prescribed in the LOSC may be deemed as satisfying archipelagic needs and as safeguarding archipelagic interests, rendering thus the archipelagic concept redundant; secondly, the provisions of the LOSC relating to straight baselines are examined and interpreted with a view to reaching a conclusion regarding their potential applicability in the case of archipelagos.

Secondly, the issue of dependent midocean archipelagos is examined from a dynamic and evolutionary perspective. As noted by the International Court of Justice international law is not a static set of rules but it undergoes 'continuous evolution'.[38] This evolutionary procedure of international law is based on a continuous tension between states' interests and needs, which has the potentiality of creating or changing the law. Thus, the current status of general customary law with regard to dependent outlying archipelagos is assessed. This requires the examination of the various elements of customary international law and the assessment of whether these elements are present in the case of dependent outlying archipelagos. In particular, the practice of continental states consisting in the application of straight baseline systems for the delimitation of

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[38] *Case concerning the Barcelona Traction, Light and Power Company Limited (Second Phase)*, (Judgment of 5 February 1970) International Court of Justice *Reports of Judgments, Advisory Opinions and Orders*, p. 33.

the maritime zones of their midocean archipelagos and their beliefs regarding the legality of their actions (*opinio juris*) are examined in conjunction with the reaction of the rest of the states of the international community vis-à-vis this practice. The outcome of this assessment will reveal whether general customary law has, nowadays, evolved establishing a special regime for dependent midocean archipelagos.

The same process is followed for the ascertainment of the existence of special rules of customary international law deriving from particular examples of state practice. In this respect, two case studies have been carried out with regard to the straight baseline systems applied in the Galapagos and the Faroe Islands. These two dependent outlying archipelagos have been chosen for the reason that they both compose the 'oldest' manifestations of the archipelagic concept in international law and that there is strong indication that they have been accepted by the international community.

In order to attain these objectives, the research of the present thesis focuses on an analysis of primary and secondary legal materials. For the interpretation of the provisions of the LOSC on straight baselines, the views adopted by various authors and the UN Division on Ocean Affairs and the jurisprudence of the ICJ are analysed and critically assessed. The practice of states, in the form of national legislation, is also scrutinised and used as a tool for the interpretation of the relevant provisions of the LOSC.

Furthermore, the national legislation of continental states applying straight baselines to their outlying archipelagos has been collected and maps showing the actual application of these systems are presented. For the assessment of the compatibility of these systems with the LOSC, measurements of the straight baseline systems applied to each archipelago have been carried out particularly concerning the distances between the islands and the length of the straight baselines.

The ascertainment of custom in international law is a difficult endeavour due to the complications arising from the diversity of opinions in the theory of customary law and the difficulty first in tracing the relevant state practice and verifying its actual application and second in detecting the views of both practicing and non-practicing states. Theories of customary international law as well as the jurisprudence of the ICJ on custom-formation have been analysed in order to assess the impact of the practice of continental states in their outlying archipelagos upon the status of international law. Research on the official and unofficial statements revealing the legal perception of the states engaged in the practice and of the other states of the international community has

also been carried out. Where possible, information has been collected from ministries of foreign affairs and hydrographic offices of the states engaged in the relevant practice.

IV. The structure of the thesis

The First Chapter examines the evolution of the archipelagic concept and critically assesses the various proposals submitted by legal scholars within the framework of learned societies and by states before and during the Third Conference on the Law of the Sea (UNCLOS III). Much of the analysis has focused on the negotiations during UNCLOS III which led to the adoption of Part IV of the LOSC on archipelagic states with a view to highlighting the conflicting state interests and to reaching some conclusions with regard to the treatment of archipelagos in international law and particularly with regard to the reasons which led to the exclusion of dependent outlying archipelagos from the archipelagic regime prescribed in the LOSC. Finally, the archipelagic regime is critically assessed and conclusions are drawn regarding the status of dependent outlying archipelagos within the LOSC.

The Second Chapter examines whether there are any possibilities arising from the LOSC on the basis of which archipelagic needs and interests may be satisfied for dependent outlying archipelagos. This Chapter is divided in two parts. The first part of this Chapter explores whether a multi-zone regime in the waters of archipelagos composed of the zones of coastal jurisdiction prescribed by the LOSC may satisfy archipelagic claims in terms of needs and interests. This is an important aspect of any discussion on the issue of archipelagos due to the arguments raised by commentators that the various maritime zones prescribed by the LOSC and particularly the Exclusive Economic Zone have rendered the archipelagic concept redundant. The second part of this chapter addresses the question of the potential application of straight baselines to groups of islands on the basis of the provisions of the LOSC on baselines. In this respect, article 7 of the LOSC on the application of straight baselines to coasts fringed with islands and article 10 on bay closing lines are analysed and their potential application to dependent outlying archipelagos – and the conditions under which this application may be realised – is assessed.

The ambit of the application of article 7 to groups of islands is further explored in the Third Chapter where the practice of continental states in their outlying archipelagos is presented and examined. This chapter further discusses the implications incurred by

the geographic multiformity of archipelagos and assesses how geographic particularities affect the application of a special regime to archipelagos.

The practice of continental states in their outlying archipelagos is also presented with a view to assessing whether such practice has contributed to the formation of customary law providing for a special regime for dependent outlying archipelagos. The law-creating value of such practice is examined in Chapter 4. This Chapter first addresses the issue of special customary law and explores the potential establishment of rules of special customary law for specific archipelagos. The cases of the Faroe Islands of Denmark and the Galapagos Islands of Ecuador are presented as fulfilling the conditions for the establishment and validation of special customary rules.

Chapter 4 further examines the status of general customary international law with regard to dependent outlying archipelagos. In particular, it attempts to answer the question of whether state practice as analysed in Chapter 3 has led to the emergence of a customary rule according to which continental states may apply a straight baseline system to their outlying archipelagos.

Chapter 5 draws from the conclusions reached in Chapter 4 regarding the status of customary international law and appraises the implications for dependent outlying archipelagos. It is argued that since the emerging general customary rule, as found in Chapter 4, concerns solely closely-knit archipelagos (namely groups the islands of which are located at close distance from each other and where the waters of the archipelago and the land domain are closely linked), broadly-scattered archipelagos will not be able to benefit from this rule, as the latter do not meet the conditions regarding the close link between the waters and the land. It is argued in this Chapter that there is a *lacuna* in international law concerning the treatment of these archipelagos and an analogical application of the archipelagic regime as prescribed in Part IV of the LOSC to broadly-scattered archipelagos is suggested. Questions that this Chapter addresses concern whether archipelagic states and dependent outlying archipelagos have sufficiently similar needs and interests which could justify their being treated in the same way through the recognition of a special regime for them. Furthermore, the question of whether the application of the archipelagic regime to dependent outlying archipelagos will pose a threat to the inclusive interests of the international community is examined.

Finally, this thesis concludes with an overview of the treatment of archipelagos in international law on the basis of the conclusions reached in each Chapter. The

distinction between closely-knit and broadly-scattered archipelagos and the application of straight baselines leading to the internalisation of waters in the first case and the application of the archipelagic regime as prescribed by the LOSC in the latter – irrespective of the political status of the archipelagos, takes into account the variety of their geographical particularities and the interests of both archipelagos and the international community. Additionally, the criticism raised by some legal authors regarding the application of straight baselines as a tendency of 'creeping jurisdiction'[39] is addressed with a view to demonstrating that the application of the archipelagic concept, especially in the dual form suggested above, does respect and satisfactorily accommodates the interests of the international community.

[39] This criticism has been expressed by W.M.Reisman and G.S.Westerman in their study on *Straight baselines in International Maritime Boundary Delimitation* (London: McMillan, 1992), p. 191 *et seq.*.

Chapter 1: The development of the archipelagic concept in international law and the archipelagic regime of the Law of the Sea Convention

1.1 INTRODUCTION

Theoretical preoccupations concerning the question of the delimitation of the territorial sea of archipelagos go back to the end of the nineteenth century. Various learned legal societies showed an interest in this issue in their attempts to codify the rules governing the law of the sea. The International Law Association, the American Institute of International Law and the Harvard Research in International Law discussed – albeit in a cursory way – the issue of applying a method different from the traditionally envisaged of the low-water mark for the delimitation of the territorial sea of groups of islands.[1] The initial proposals endorsing the unitary approach referred to the application of straight baselines around groups of islands on the condition that the distance between the islands of the group would not exceed double the breadth of the territorial sea.[2]

The issue of the delimitation of the territorial sea of groups of islands was included in the agendas of the 1930 Hague and the 1958 Geneva Conference on the Law of the Sea. The solution suggested concerned the application of straight baselines joining the outermost points of the islands and the internalisation or territorialisation of the enclosed waters. Nevertheless, no conclusion could be reached due to divergence in the positions of states as well as due to the implications caused by the wide variety of the geographical particularities of archipelagos.

Indeed, legal scholars and state delegates were faced with the problem of 'rendering' a geographical notion, which is the archipelago, into a juridical concept from which legal rights would derive. A shift in international law with regard to outlying archipelagos was realised during the Third Conference on the Law of the Sea, which articulated the archipelagic concept in legal terms and adopted Part IV of the Convention on the Law of the Sea (LOSC).

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[1] These proposals are analysed *infra*, p. 18 *et seq.*.
[2] The breadth of the territorial sea was also an issue of dispute among states and various proposals had been advanced ranging from 3 n.m. to 10 n.m.

According to Part IV of the LOSC, archipelagic states, that is states 'constituted wholly by one or more archipelagos'[3] have the right, under specific conditions referring to the length of the baselines and the water-to-land ratio of the archipelago, to 'draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago'.[4] The core of previous proposals, namely the application of straight baselines, was maintained but, as will be demonstrated later, the conditions for such application are much more generous in terms of the distances between the islands. However, the enclosed waters – despite initial suggestions for their being considered as internal or territorial waters – were attributed a *sui generis* regime, according to which the archipelagic state exercises sovereignty subject though to various restrictions in favour of third states.[5]

This chapter examines the evolution of the archipelagic concept from its first inclusion in the agenda of an international institution until its adoption in Part IV on archipelagic states of the Convention of the Law of the Sea. Since, as mentioned above, the change in the treatment of the archipelagic problem occurred at the Third Conference on the Law of the Sea, the present Chapter examines separately the proposals preceding and the proposals during UNCLOS III with the view to highlighting their differences and particularly showing the issues which were not taken into consideration during the Conference. In the first part of this chapter, emphasis is given to the solutions suggested before and after the landmark decision of the ICJ in the *Fisheries case*, particularly with regard to the system to be applied for the measurement of the territorial sea of groups of islands and the legal status of the enclosed waters. Some of the characteristics of these early proposals have influenced the practice of continental states in their outlying archipelagos, which will be examined in Chapter 3. In the second part, particular emphasis has been given to the negotiation process of the Third Conference on the Law of the Sea with a view to stressing the conflicting state interests and to reaching some conclusions regarding the reasons that led to the absence of a provision on archipelagos forming part of a continental state in the Convention on the Law of the Sea. In this second part, the attributes of the archipelagic regime and particularly its shortcomings are assessed critically on the basis of the trade-offs and the compromises reached during UNCLOS

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[3] Article 46 (1) LOSC.
[4] Article 47 (1) LOSC.
[5] Articles 49-54 LOSC; for an analysis of these articles see *infra* p. 32 *et seq.*.

III. Lastly, some conclusions are drawn from the analysis of the *travaux preparatoires* concerning the implications of the adoption of Part IV of the LOSC for the archipelagic concept and for dependent midocean archipelagos.

1.2 Proposals and evolution of the archipelagic concept prior to the Third Conference on the Law of the Sea

From the beginning of the 20th century till the late 1960s, the issue of archipelagos was discussed as part of the broader debate concerning the territorial sea. The main question concerned whether groups of islands should be treated as a whole for the measurement of the territorial sea and under what conditions. However, international conferences – despite the meticulous work of international learned legal societies and the influential impact of the decision of the ICJ in the *Fisheries case* – were not able to reach an agreement with regard to the adoption of a special system for the measurement of the territorial sea of groups of islands.

In the following subsections, the basic attributes of the solutions reflecting the archipelagic concept will be surveyed. The analysis has been divided into two parts concerning early discussions primarily of learned legal societies and later discussions mostly conducted in the framework of the ILC and UNCLOS I and II. What distinguishes early proposals from later discussions on the issue of archipelagos is the influential impact of the decision of the ICJ in the 1951 *Fisheries case*. The legitimization of the straight baseline concept in international law as pronounced by the Court strengthened archipelagic claims. Nevertheless, despite this impact, both the First and the Second Conferences on the Law of the Sea failed to adopt a special regime for outlying archipelagos.

It should also be stressed that these early proposals as reflected in the discussions of learned societies, the negotiations in international Conferences and lastly the decision of the ICJ in the *Fisheries case* are of interest for the present thesis as they have influenced the practice of states and particularly the way states perceive their rights in groups of islands even nowadays.[6] The impact of these proposals will be further explored in Chapter 3 and 4 where the practice of continental states with regard to the baseline system to be applied to their outlying archipelagos will be examined.

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[6] The impact of these proposals upon the current practice of states will be discussed in Chapters 3 and 4.

Another element which should be emphasised at the outset is the fact that the political status of archipelagos, that is whether they constitute independent states or parts of a continental state, was not an issue in these early proposals. This, however, reflects the political situation at the time when these discussions took place, as most groups of islands were not independent states but belonged to a continental state.[7] The system applicable and the conditions for its application were based purely on geographical reasons while political implications for the treatment of archipelagos emerged only after the independence of previously colonized archipelagos, such as Indonesia, the Philippines, Fiji etc.

A. Early proposals regarding the treatment of archipelagos in international law:

(a) The straight baselines concept and conditions for its application to groups of islands

The straight baseline concept was proposed and used in a broader context regarding mainland coasts as well as groups of islands. The functions this concept was called to perform varied. It was initially advanced as a 'rationalisation technique' simplifying and 'smoothing out the outer limit of the territorial sea.[8] States applying such system were motivated by the need to protect waters lying in close proximity to their coasts[9] or as Reisman and Westerman argue by the need to expand seaward their coastal jurisdiction.[10]

For outlying groups of islands, O'Connell suggested that the purpose for applying a special regime was to enclose 'more waters within the group than would be enclosed by the normal method of drawing the territorial sea from each island'.[11] In this sense, the application of the straight baseline system would internalise waters which would have the status of either territorial waters or high seas if the low-water mark was applied. The justification of such application was initially geographic on the basis of the compact nature of the archipelago and the archipelagic concept was advanced as a matter concerning the delimitation of maritime jurisdiction of these states in the waters of the archipelago.

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[7] States composed entirely of islands, such as the UK or Iceland, were not thought as archipelagos.
[8] M.W.Reisman & G.S.Westerman (1992), p. 191. See *ibid*, p. 1-18 on the development of the concept of straight baselines.
[9] R.D.Hodgson & L.M.Alexander, (1972), p. 2; see also the practice of some states in the 19th century, D.P.O'Connell (1971), p. 45 *et seq.* and the practice of states in their archipelagos after the *Fisheries case*, *infra*, p. 21-3.
[10] W.M.Reisman & G.S.Westerman (1992), p. 192.
[11] D.P.O'Connell, 'Mid-Ocean Archipelagos in International Law', 45 *BYIL* (1971), p. 4.

Archipelagos, at this early stage of discussions, were not treated as a distinct matter in the codificatory process of the law of the sea. The solutions for a special treatment of groups of islands in international law, regardless of whether they were coastal or outlying, were connected with the measurement of the territorial sea. While some learned societies, such as the International Law Association[12] and the Harvard Law School,[13] were reluctant to accept that archipelagos should be treated differently for the purposes of the measurement of the territorial sea, most private institutions and legal scholars adopted the unitary concept in the treatment of archipelagos for the purposes of measuring the territorial sea. The suggested method consisted in the use of straight baselines encircling the outermost islands of the group. The distance between the islands was an issue under discussion with proposals varying from double the breadth of the territorial sea[14] to no distance-requirement. [15]

The issue of the distance requirement for the application of straight baselines to groups of islands was discussed in the Hague Conference on the Law of the Sea in 1930.[16] The draft provision of the Sub-Committee in the Hague Conference on the Law of the Sea stipulated no distance requirement between the islands for the

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[12] See ILA *Report, 33th Conference* 1924, Stockholm, (London: Sweet & Maxwell, Ltd 1925), p. 259 *et seq*; similarly ILA *Report, 34th Conference* 1926, Vienna, (London: Sweet & Maxwell Ltd, 1927), p. 40 *et seq.*.

[13] 23 *AJIL*, Special Suppl., 1929, Draft Convention on Territorial Waters, p. 287-288. However, the Draft Convention on Territorial Waters included a provision (article 11) titled 'Assimilation of small areas to marginal sea that could be implemented in the case of a group of islands'; particularly, this article stipulated that if the delimitation of the marginal sea resulted in leaving a small area of high seas totally surrounded by the territorial sea of a single state, such area would be assimilated to its territorial sea. This provision could lead to the territorialisation of pockets of high seas located inside an archipelago without the use of straight baselines.

[14] Some proposals provided that the distance condition should refer to the islands in the periphery of the group irrespective of their distance from the centre (see, for example, the proposal by the Institute de Droit International: 33 *Annuaire de l'Institut de Droit International*, 1927, p. 81) whereas others provided that the distance should refer to all the islands of the group (34 *Annuaire de l'Institut de Droit International*, 1928, p. 673). Practically the difference would be that in the latter case the proposal would lead to the internalisation of territorial waters where in the former it would be likely that pockets of the high seas inside the archipelago would become internal waters (since it was not necessary that the territorial seas generated from each island would overlap).

[15] See Professor Alvarez's draft convention submitted to the 33rd Conference of the ILA, *Report of the 33rd Conference* 1924, Stockholm, (London: Sweet & Maxwell, Ltd 1925), p. 259 *et seq.*; similarly. J.Colombos, *The International Law of the Sea* (5th rev. ed.) (London: Longmans, 1962), p. 120; J.C.Jessup, *The law of Territorial Waters and Maritime Jurisdiction* (New York: G.A.Jennings Co, 1927), p. 457.

[16] The responses of states to the questionnaire addressed to them by the preparatory Committee of the Conference showed diversity in their views. The majority of States rejected the notion of considering archipelagos as units for the delimitation of the territorial sea (those states were Australia, Great Britain, South Africa, Bulgaria, Denmark, India, Italy, New Zealand and Romania) while other states supported the application of a straight baseline system to groups of islands under the condition of a maximum distance between the islands varying from 6 to 10 n.m (Germany, Netherlands, Japan, Finland and Latvia). LN Doc. C.74, M.39, 1929, V, p. 48-51.

application of straight baselines.[17] During the negotiations, the United States rejected the unitary concept in the treatment of archipelagos and proposed that each island should generate its own belt of territorial waters measured three miles from the coast.[18] Japan accepted the application of straight baselines to groups of islands under the condition of a distance of maximum ten n.m. [19] while Portugal accepted no distance requirement for such application.[20] Due to the divergence in the views of participants, the issue of the measurement of the territorial sea of archipelagos was not discussed in the Plenary of the Conference.[21]

(b) The regime of the enclosed waters

Most proposals supporting the unitary theory entailed no provision with regard to the status of the enclosed waters; it could be, however, implied that, since according to these proposals the territorial sea was to be measured from the straight baselines joining the outermost islands of the group, the enclosed waters had the status of internal waters. On the contrary, some proposals were explicit in considering the waters enclosed by straight baselines as territorial waters.[22]

According to O'Connell states participating in the Hague Conference 'seem to have assumed that these would be territorial waters, not inland waters'.[23] These states did not address explicitly the issue, so no definite conclusion may be reached regarding the possible views of states on the legal regime of the enclosed waters. Only Germany remarked that there would be implications for navigation in the waters of

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[17] LN, Document C.196, M.70, 1927, p. 72. Specifically the draft proposal read as following 'In the case of archipelagos, the constituent islands are considered as forming a whole and the width of the territorial sea shall be measured from the islands most distant from the centre of the archipelago'. With regard to coastal groups of islands article 5 of the Draft Convention prepared by Schucking provided that 'if there are natural islands not continuously submerged and situated off a coast, the inner zone of the sea shall be measured from these islands except in the event of their being so far distant from the mainland that they would not come within the zone of the territorial sea if such zone were measured from the mainland. In such case, the island shall have a special territorial sea for itself'.

[18] *Ibid*, p. 200.

[19] LN, Document C. 351 (b), M. 145 (b), 1930 V, p. 189. Proposals stipulating a maximum distance of 10 n.m. seem to have been treating groups of islands as fictive bays, as the distance suggested for bay closing lines was 10 n.m. See H.W.Jayawardene (1990), p. 128. Similarly, Gidel, albeit reluctant to accept a special treatment for outlying archipelagos proposed that pockets of high seas inside the archipelago may be eliminated by the analogous application of the rule applicable to bays of a 10-mile closing line; G.Gidel (1934), p. 718.

[20] *Ibid*, p. 192.

[21] LN, Document C. 351 (b), M. 145 (b), 1930 V, p. 219.

[22] See the second Basis of Discussion proposed by the Preparatory Committee of the 1930 Hague Conference, League of Nations, C. 74, M. 39, 1929, V, p. 50-51. See also the suggestion by G.Gidel (1934), p. 718; M.S.McDougal & W.T.Burke (1962), p. 411.

[23] D.P.O'Connell (1971), p. 11.

archipelagos should they be enclosed by straight baselines.[24] O'Connell regretted the fact that neither the Hague Conference nor legal scholars showed 'more awareness of this fundamental issue'.[25]

Despite these early proposals by learned societies and legal scholars, the international community, as manifested by the discussions in the Hague Conference, was reluctant to accept any special system for the delimitation of the territorial sea of groups of islands. The archipelagic concept further evolved due to the influential decision of the International Court of Justice in the 1951 *Fisheries case*. The impact of this decision upon the evolution of the archipelagic concept is discussed in the following subsection.

B. The impact of the *Fisheries case* upon the evolution of the archipelagic concept

The decision of the ICJ in the *Fisheries case* was a landmark in the development of international law regarding the baselines to be used for the measurement of the territorial sea. Reisman and Westerman emphatically maintain that 'few decisions of the ICJ have been so clearly and directly responsible for a major change in international law'.[26]

In this case brought before the International Court of Justice by the United Kingdom, the dispute concerned the validity of the system of straight baselines applied by Norway for the delimitation of the Norwegian fisheries zone.[27] In 1935 the Norwegian government enacted a Royal Decree establishing an area reserved for the exclusive fishing of its citizens the limits of which were to be measured from straight baselines drawn between fixed points on the mainland, on islands or rocks.[28] The Court found that the system applied by Norway was not contrary to international law stating that 'where a coast is deeply indented and cut into as is that of the Eastern Finmark or where it is bordered by an archipelago such as the 'skjaergaard' along the western sector of the coast here in question the baseline becomes independent of the low water mark and can only be determined by means of a geometric construction.'[29]

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[24] LN, Doc. C.74, M. 39, 1929 V, p. 48.
[25] D.P.O'Connell (1971), p. 11.
[26] W.M.Reisman and G.S.Westerman (1992), p. 37; P.E.J.Rodgers (1981), p. 49 *et seq.*
[27] *Fisheries case* (United Kingdom v. Norway, Judgment of 18 December 1951) *ICJ Reports*, p. 118.
[28] *Ibid*, p. 125.
[29] *Ibid*, p. 129.

The innovation of this decision was two-fold. Firstly, the Court recognised that the geographical particularities of the Norwegian coast justified the application of a different method for the delimitation of the territorial sea than the traditionally applied rule of the low-tide basepoints on the coast.[30] The ICJ specifically declared that 'such a coast viewed as a whole calls for the application of a different method'.[31] The second innovative element in the judgment of the Court was its focus on non-geographical reasons which justified, in its opinion, the application of a system of straight baselines for the delimitation of the territorial sea.[32] The ICJ, in particular, concluded that the dependence of the local population of the islands and the mainland on the fishing resources of the 'skjaergaard' and the utilisation of the numerous straits, channels and waterways as a means of communication for the inhabitants of the area were realities which should be borne in mind when delimiting the territorial sea.[33]

Equally important in the reasoning of the Court was the consideration of the Norwegian argument that the waters enclosed by the baselines had always been regarded as an appurtenance of the Norwegian mainland. The Court declared that '...even before the dispute arose, this method had been consolidated by a constant and sufficiently long practice in the face of which the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law'.[34]

The arguments invoked by the litigants on the issue of archipelagos also merit attention. The British government in its Memorial to the Court contended that there was no special international rule regarding archipelagos and thus, the traditional rule of treating each island as an entity should be applied.[35] However, in its Reply submitted to the Court, the UK stated as a subsidiary argument that if the Court accepted that customary rules regarding straight baselines had been developed for archipelagos or coastal islands, such a rule should be subject to an absolute limit of 10 miles on the length of the baselines.[36] On the other hand, Norway supported the view that the issue

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[30] The Court reached the conclusion that the solution regarding the method used for the delimitation of the territorial sea 'is dictated by geographic realities', *ibid,* p. 127-128.
[31] *Ibid*, p. 129.
[32] The Court described the system of straight baselines as following: 'This method consists of selecting appropriate points on the low-water mark and drawing straight lines between them', *ibid*, p. 129-130.
[33] *Ibid*, p. 127-8.
[34] *Ibid*, p. 127.
[35] *Fisheries* case, *ICJ Pleadings* 1951, vol. I, p. 79-83. In particular, the UK contended that 'the creation of a special regime for archipelagos ... both presents serious technical difficulties and, if adopted, would constitute a derogation from the freedom of the seas in the areas affected'; p. 82.
[36] *Ibid* Vol. II, Reply of the British Government, p. 552, para. 361; see also J.Evensen, 'The Anglo-Norwegian Fisheries case and its Legal Consequences', *46 AJIL* (1952), p. 617.

of archipelagos should be treated separately of any other regime applied to islands, making at the same time a distinction between coastal and mid-ocean archipelagos.[37]

The Court referred also to the work of the experts of the Second Sub-Committee of the 1930 Conference for the codification of international law regarding the delimitation of the territorial sea, stating that the Committee was obliged to admit many exceptions to the low-water mark rule following all the sinuosities of the coast relating to bays, islands near the coast and groups of islands.[38] The Court also rejected the British argument that the maximum length of the straight baselines should not exceed 10-miles, stating that 'the ten-mile rule has not acquired the authority of a general rule of international law' neither for the closing line of bays, nor for straight baselines joining islands or islands and the mainland'.[39] On this issue, the Court also observed that 'the attempts that have been made to subject groups of islands or coastal archipelagos to conditions analogous to the limitations concerning bays (distance between the islands not exceeding twice the breadth of the territorial waters or ten or twelve sea miles) have not got beyond the stage of proposals'.[40]

Finally, despite the fact that the Court stressed the exceptional character of the Norwegian coast, it has been argued that most of the principles enunciated by the Court could be equally applicable to mid-ocean archipelagos.[41] O'Connell, in particular, contended that the application of the principles taken into consideration by the Court only to coastal archipelagos would lead to 'an unfair discrimination' against mid-ocean archipelagos and 'an artificially selective application' of these considerations.[42]

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[37] *Ibid,* p. 466-469. Norway stressed the importance of geographic particularities in deciding on the regime to be applied to archipelagos; it also stressed the fact that the unitary theory for archipelagos had been accepted by legal scholars and learned societies at that time.

[38] *Fisheries case, ICJ Rep. 1951*, p. 129. However, Waldock contended that the rules of law laid down by the Court were fundamentally divergent from those accepted by the majority of states at the 1930 Hague Codification Conference; H.M.Waldock, 'The Anglo-Norwegian Fisheries Case', 28 *BYIL* (1951), p. 114.

[39] *Ibid*, p. 131.

[40] *Ibid.*

[41] See J.Evensen (1958), p. 299; D.P.O'Connell (1971), p. 15; P.E.Rodgers (1981), p. 60-2. C.F.Amerasinghe, 'The problem of Archipelagos in the international law of the sea', 23 *ICLQ* (1974), p. 545-546: this author identified some of the principles applied by the Court, which could also be applied in the case of midocean archipelagos. For example, the economic interests of the archipelagic state and its historic practice as well as the close relationship of the sea and the land could be factors determining whether straight baselines should be used in delimiting the territorial waters of an archipelago. With regard to the straight baselines to be applied, he contends that according to the Court the straight baselines should follow the general configuration of the coast and should be reasonable in length.

[42] D.P. O'Connell (1971), p. 15.

The principles enunciated by the ICJ for the application of straight baselines have influenced states in the application of straight baselines in their outlying archipelagos. We will come back to the impact of the *Fisheries case* upon international law regarding the drawing of straight baselines in outlying archipelagos when the state practice and its law-creating value towards the formation of customary law will be discussed in Chapter 4.[43]

C. Proposals and discussions on archipelagos in the aftermath of the *Fisheries case*

(a) State practice reflecting the archipelagic concept

The principles enunciated by the ICJ were influential upon the decision of states to apply straight baselines either to their coasts or to their outlying archipelagos.[44] Some of the principal archipelagic claims were raised by states right after the delivery of this decision.

Ecuador declared a system of straight baselines around the Galapagos archipelago in 1951 and considered the archipelago as a unit for the delimitation of the territorial sea and for the regulation of fishing within this zone.[45] Denmark applied a similar system in the Faroes Islands in 1955, which was subsequently elaborated by virtue of the 1963 Royal Decree.[46] Indonesia also issued a communiqué in 1957 proclaiming its absolute sovereignty over the waters of the archipelago. This claim was based upon the unique geographical features of the archipelago, its consideration as a compact whole from time immemorial and the preservation of the wealth of the Indonesian state.[47] In 1955 the Philippines raised an archipelagic claim through a *note verbale* addressed to the Secretary General of the United Nations.[48] The justification of

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[43] See Chapter 4, p. 250 *et seq*...

[44] Syatauw characteristically pointed out that 'many states saw the decision as a green light for introducing major changes in the law of the sea', J.J.G.Syatauw, 'Revisiting the Archipelago – An old concept gains new respectability', 29 *Indian Quarterly* (1973), p. 107.

[45] See Chapter 3, p. 140-143. Ecuador had previously (in 1934) enacted legislation considering the archipelago as a whole but it specified the straight baselines applied around the archipelago in 1951.

[46] See Chapter 3, p. 143-146.

[47] The governmental communiqué proclaimed that 'the waters around, between and connecting the islands or parts of the islands forming the Indonesian archipelago, irrespective of their width or dimension are natural appurtenances of its land territory and therefore form an integral part of the inland or national waters subject to the absolute sovereignty of Indonesia', M.Whiteman, *Digest of International Law*, Vol. 4, (Washington: US Department of State, US Government Printing Office, 1974), p. 284. This governmental announcement took the form of state's law in an Act of 18 February 1960, (Act of 1960 as quoted in O'Connell (1971), p. 39). The USA protested against the Indonesian and the Philippino claim and Australia and Japan protested against the former; M. Whiteman, *ibid*, p. 283-5.

[48] GA Off.Rec., Tenth Session, Suppl. No 9, Doc. A/2934, pp. 36-7. Specifically, it stated, that 'all the waters around between and connecting different islands belonging to the Philippines Archipelago,

this claim was based upon geographical reasons, specifically the compact unit of the archipelago and upon historical considerations particularly referring to various Treaties signed since 1898 in which the archipelago was considered as a whole.[49]

(b) The application of the straight baseline concept to outlying archipelagos in the discussions of the ILC and the First Conference on the Law of the Sea

The principles identified by the Court in its judgment were taken into account when the question of archipelagos was discussed in the ILC and in the First Conference on the Law of the Sea.

In 1952 the ILC took up the work of preparing a draft Convention on the Law of the Sea, which would serve as a discussion document for a future Conference. François, the Special Rapporteur of the Commission, included in his first and second Report to the GA on the Regime of the Territorial Sea a draft provision declaring the right of states to draw a 10-mile baseline with regard to islands situated along the coast as well as to a group of islands (archipelago).[50] The draft article incorporated in his Third Report provided for shorter straight baselines (5 n.m.) with the exception of one measuring 10 n.m. [51]

Despite the strict conditions stipulated in the above provision regarding the maximum length of the baselines, which was principally due to the wide variety of geographical differences and peculiarities of archipelagos,[52] the members of the Commission rejected the proposed article on the delimitation of the territorial sea of a group of islands.[53]

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irrespective of their width or dimension are necessary appurtenances of its land territory forming an integral part of the national or inland waters subject to the exclusive sovereignty of the Philippines'.

[49] UN Doc.A/2934, 1955, p. 52-3. These reasons were also advanced by the Philippines in the Philippine Congress which came into force in 1961; see Republic Act No. 3046 quoted in O'Connell (1971), p. 28.

[50] UN Doc.A/CN.4/53 First Report by J.P.A.Francois, Special Rapporteur on the Regime of the Territorial Sea, Article 10, *ILCYB*, 1952, vol. II, (New York: United Nations Publ., 1958), p. 36. It was also specified in the commentary of this article that article 10 was adopted not as an expression of international law but as a basis for discussion reflecting a progressive development of international law. The proposed 10-mile-length line manifested an attempt to treat archipelagos as fictive bays, as the maximum proposed length for the closing lines of bays was also 10 n.m.. UN Doc.A/CN.4/61, Second Report, *ILCYB*, 1953, vol. II, (New York: United Nations Publ., 1959), p. 69; All these proposals provided for the internalisation of the enclosed waters.

[51] UN Doc. A/CN.4/61/Add.1, *ILCYB*, 1953, Vol. II (New York, United Nations Publ., 1959), p. 77 and UN Doc.A/CN.4/77, Third Report by J.P.A.François, Special Rapporteur on the Regime of the Territorial Sea *ILCYB*, 1954, vol. II, (New York: United Nations Publ., 1960), p. 5.

[52] J.Evensen (1958), p. 293.

[53] The deletion of this article was accepted by 10 votes to none with 2 abstentions; *ILCYB*, 1955 Vol. I (N.York: UN Publ., 1960), p. 217-218. Article 11 referring to the delimitation of the territorial sea of a group of islands had the indication 'postponed' under the title of the article.

Similarly, in the First Conference on the Law of the Sea convened in Geneva in 1958, the question of the regime of archipelagos was not discussed as a distinct issue but only within the framework of the discussions on the measurement of the territorial sea. The proposals submitted by Indonesia,[54] the Philippines,[55] Yugoslavia[56] and Denmark[57] provided for the application of straight baselines to groups of islands without specifying any maximum distance between the islands of the group or any maximum length for the straight baselines to be used. Due to lack of support these proposals were subsequently withdrawn and the question of archipelagos was regarded as too complicated to be resolved at that stage particularly concerning the disagreement among states concerning a maximum length for the baselines joining the islands.[58]

On the contrary, coastal archipelagos were accorded a special system in terms of baselines. During the early stage of the discussions on archipelagos, the solutions suggested for coastal and outlying archipelagos had a common rationale and a common denominator, that is the application of straight baselines joining the various features with the difference that in the case of coastal archipelagos the group of islands would be connected with baselines to the mainland coast whereas in the case of outlying groups the straight baseline system would join the islands of the group as an autonomous whole. The distinctive element in the consideration of archipelagos as coastal or outlying was the distance between the archipelago and the coast.[59]

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[54] UNCLOS I Off.Rec., vol. III, 7th Meeting, para. 5, p. 15.

[55] *Ibid,* Doc A/CONF.13/C.1/L.98, p. 239. According to this draft article 'The baselines shall be drawn along the coast of the outermost islands, following the general configuration of the archipelago'. Along with this article, the Philippine representative submitted also an alternative article which provided that 'When islands lying off the coast are sufficiently close to one another as to form a compact whole and have been historically considered collectively as a single unit, they may be taken in their totality and the method of straight baselines provided in article 5 may be applied to determine their territorial sea, the baselines shall be drawn along the coast of the outermost islands, following the general configuration of the group'.

[56] *Ibid*, Doc A/CONF.13/C.1/L.59, p. 227.

[57] *Ibid*, Fifty-Second Meeting, para. 29, p. 162. Denmark adopted and reintroduced the Yugoslav proposal; Iceland supported the Danish proposal, *ibid*, para. 30, p. 162.

[58] UNCLOS I Off.Rec., 1958, Vol. III, p. 162-3. In the Fifty-Second Meeting of the Conference the Yugoslavian representative withdrew the proposal of his country on the grounds that it did not receive enough support from other states (para 28). The Danish representative reintroduced the Yugoslavian proposal (para 29) but finally withdrew it (para 41) after the UK's representative, Sir Gerald Fitzmaurice, pointed out that the question of archipelagos was important but required considerably more study so that the complexities of these problems were resolved (para 38). See also D.P.O'Connell (1971), p. 21.

[59] For example, according to the draft proposals produced by the Institut de Droit International, in cases where the group of islands was located at a distance more than double the breadth of the territorial sea from the mainland coast, the group was characterised as outlying and the straight baselines would

In the aftermath of the *Fisheries case*, the ILC recognised that the Judgment of the ICJ in this case was expressing the law in force and took the principles enunciated therein as the basis of its draft article on groups of islands located in close proximity to the coast.[60] The draft provision stipulated that a system of straight baselines could be applied 'as an exception, where this is justified for historical reasons or where circumstances necessitate a special regime because the coast is deeply indented or cut into or because there are islands in its immediate vicinity' (article 5).[61] Indeed, the application of straight baselines for coasts 'deeply indented and cut into or where there is 'a fringe of islands along the coast in its immediate vicinity' was endorsed in article 4 of the Convention on the Territorial Sea and the Contiguous Zone. This provision was transferred *verbatim* to article 7 of the LOSC. Despite some deficiencies, this article has been considered as providing a feasible solution for the case of coastal archipelagos.[62]

(c) The regime of enclosed waters in the discussions of the ILC and the First Conference on the Law of the Sea

Both the draft of the Special Rapporteur of the ILC and the proposals of states during UNCLOS I provided that the waters enclosed by straight baselines would have the status of internal waters. There was, however, a debate as to whether additional navigational rights should be recognised in internal waters created by the designation of straight baselines.

The recognition of navigation rights of foreign vessels in the internal waters of a coastal state was raised by the UK in the *Fisheries case*. In particular, the UK,

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encircle the group as an autonomous whole; 34 *Annuaire de l'Institut de Droit International*, 1928, p. 673; see *supra* note 14.

[60] *Ibid*, p. 155.

[61] The maximum permissible length for straight baselines was 10 n.m.. UN Doc. A/2693, Report of the ILC to the GA, *ILCYB*, 1954, Vol. II, (New York, UN Publication, 1959), article 5, p. 154. It is true that there was no mention in this draft provision to 'coastal archipelagos' and the ILC was careful to incorporate the principles enunciated in the judgment of the ICJ in the *Fisheries case*. This shortcoming was noted by Evensen, who, while welcoming this article, suggested that some changes should be make in order to reflect the geographic particularities of coastal archipelagos. In particular, the changes he suggested in the first sentence of article 5 (1) was as following: 'where circumstances necessitate a special regime because the coast is deeply indented or cut into or because there are archipelagos, islands or islets in its immediate vicinity the baseline may be independent of the low water mark'. J.Evensen (1958), p. 301.

[62] D.W.Bowett (1979), p. 89-90; M.Munavvar (1995), p. 115 *et seq.*, 183-4. Note, however, the difficulty in applying this article in cases where the coastal archipelago spreads seaward forming a sort of a cap. See the discussion on this in Chapter 3, p. 173-174. Note also the difficulty in drawing a sharp distinction between outlying and coastal archipelagos in the case of archipelagos dominated by one large islands; for an analysis of this distinction and its relevance to the archipelagic concept see Chapter 3, p. 119-122.

referring to the navigational route of Indreleia, argued that part of the waters enclosed by straight baselines – particularly those 'having the character of legal straits' - should be considered as territorial waters and not internal, in which the right of innocent passage would be applicable.[63] The ICJ rejected such contention specifically stating that since Indreleia was not a strait but 'rather a navigational route prepared as such by means of artificial aids to navigation provided by Norway', it should not be considered to have a 'status different from that of the other waters included in the 'skjaergaard'.[64]

The First Conference on the Law of the Sea solved this problem by considering that waters enclosed by straight baselines would be internal waters subject though to the right of innocent passage ascribed to foreign vessels.[65]

With regard to the application of straight baselines to outlying archipelagos, the proposals submitted by states in the First Conference on the Law of the Sea provided that the enclosed waters should have the status of internal waters. These proposals cross-referred to the provision on coastal groups of islands, which prescribed the application of straight baselines and had already been accepted in the draft articles of the ILC. It was not specified, however, whether this cross-reference would entail the analogical application of draft article 5 according to which the right of innocent passage would be recognised in the waters which had the status of territorial sea or high seas before their enclosure by straight baselines.

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[63] *Fisheries case, ICJ Rep. 1951*, p. 122, 132.

[64] It has been argued that the Court did not pronounce a ruling upon the rights of third states in waters enclosed by straight baselines as it specifically referred to the fact that Indreleia was not a strait. M.Munnavar (1995), p. 150; Pharand argues that 'under customary international law, as applied by the ICJ in the *Fisheries case* of 1951, there is no right of passage in waters enclosed by straight baselines'; he points out though that this was not accepted in UNCLOS I, D.Pharand, *Canada's Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988), p. 228-9. This issue will be also discussed in another part of the thesis, however, it should be mentioned here that the Court seems to have implicitly made a pronouncement regarding the non-application of the right of innocent passage in internal waters which do not compose straits of international navigation; see Chapter 4, p. 251, 255-256.

[65] Article 5 of the TSC which stated: 'where the establishment of straight baselines ... has the effect of enclosing as internal waters areas which previously had been considered as part of the territorial sea or of the high seas, a right of innocent passage ... shall exist in those waters'. This article was reiterated *verbatim* in article 8 (2) of the LOSC. A difference between the draft article suggested by the ILC (See the draft proposal of the ILC: article 5 (3) of articles concerning the Law of the Sea, UN Doc. A/3159, Yearbook of the ILC 1956, Vol. II, (N.York, UN Publication, Kraus Reprint Co, 1973, p. 257) and the provision adopted by the Conference should be stressed. In the draft proposal of the ILC it was specified that a right of innocent passage would be recognised 'in all those cases where the waters have normally been used for international traffic'. The ILC draft was more restricted in the sense that the right of innocent passage would be recognised only in waters used for international navigation and not in all waters enclosed by straight baselines. This condition was omitted from the adopted article and thus it seems that the only criterion would be the previous status of these waters as territorial sea or high seas regardless of the existence of a route for international traffic or navigation.

(d) Special treatment of archipelagos on the basis of historic reasons in the Second Conference on the Law of the Sea

The Philippines invoked historical reasons[66] as an argument in support of a special treatment of archipelagos in international law at the Second Conference on the Law of the Sea, convened in Geneva in 1960. [67] The rationale of this state's arguments was that there should be an exception with regard to the delimitation of the territorial sea in cases justified by historical reasons. [68] The Indonesian delegate supported the Philippines' proposal and asserted that the archipelagic principle could be no longer ignored since some countries have already implemented it in their municipal law.[69] However, the proposal regarding the application of a special regime concerning the breadth and the measurement of the territorial sea in cases of historical waters[70] was outvoted by the Conference[71] and no further consideration was given to the issue of archipelagos within the Conference.

D. Factors impeding the acceptance of a special regime for archipelagos: an interplay of geographic and political considerations

The main difficulty in the treatment of archipelagos and the chief barrier to the adoption of a special regime for them was the great variety of geographical situations involved. Geographic implications were put forward as a justification for the incapacity of the Hague Conference on the Law of the Sea and the ILC to produce a provision regulating the case of archipelagos. At the Hague Conference, the second Sub-Committee on the Territorial Sea reported to the Conference that 'owing to lack of technical details, the idea of drafting a definite text on this subject had to be

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[66] In early proposals on archipelagos, as reflected in the discussions of learned societies, history played only a marginal role. Gidel, for example, asserted that the theory of historic waters could exceptionally allow a derogation from the ordinary rules concerning the measurement of the territorial sea from the coast of each individual island, G.Gidel (1934), p. 718. Colombos who favoured the archipelagic concept stated that 'whether a group of islands forms or not an archipelago is determined by geographical conditions but it also depends, in some cases, on historical or prescriptive grounds'; C.J.Colombos (1962), p. 120.

[67] UNCLOS II Off.Rec., 5th Meeting, p. 51-2.

[68] *Ibid*, para. 20-1, p. 51. The Philippine delegate in the Conference, A. Tolentino, argued that the Philippines claim over the waters of the archipelagos was founded upon history, existing treaties and actual occupation. It is, however, interesting that he referred to the case of the Philippines archipelago as a *sui generis* case in international law which could not be covered by any general rule formulated on the breadth of the territorial sea'

[69] *Ibid*, 14th Meeting, para. 11, p. 94.

[70] *Ibid*, Annexes, p. 165-6, Document A/CONF.19/C.1/C.2/Rev.1.

[71] *Ibid*, 28th Meeting, para. 3, p. 151.

abandoned.'[72] Consequently, this issue was not discussed in the Plenary of the Conference.

Similarly, the incapability of the ILC to reach a conclusion regarding archipelagos was reflected in its Commentary of draft article 10 adopted in 1956, which noted that: 'The Commission had intended to follow up this article with a provision concerning groups of islands. Like the Hague Conference for the Codification of International law of 1930, the Commission was unable to overcome the difficulties involved. The problem is singularly complicated by the different forms it takes in different archipelagos. The Commission was prevented from stating an opinion, not only by disagreement on the breadth of the territorial sea, but also by lack of technical information on the subject. ... The Commission points out, for purposes of information, that article 5 may be applicable to groups of islands lying off the coast'[73]. It seems that the members of the ILC believed that the concept of the coastal archipelago was easy to define while there was no clear conception of what constituted a mid-ocean archipelago due to the great variety of the geographic particularities each archipelago presents.[74]

Geographic considerations were not the only issue impeding the acceptance of the archipelagic concept in international law. States were reluctant to accept any form of curtailment of their rights in parts of the high seas.[75] Those willing to accept such claims subjected any solution to strict conditions regarding the distance between the islands. What is more, the states having an interest in this issue were numerically few. Most archipelagos during this time belonged to colonial maritime powers which were

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[72] LN, Document C. 351 (b), M. 145 (b), 1930 V. 16, p. 219. Similarly, in its observations on the responses of states, the Preparatory Committee of the Hague Conference pointed out the implications of the application of a vague provision based on ambiguous geographical facts; Specifically, it observed that 'this conception (the application of straight baselines joining the outermost points of a group of islands – not in the original text) claims to be based on geographical facts. On the other hand, it raises more complicated questions than the other view (that is that each island should have its own territorial sea). In the first place, it makes it necessary to determine how near the islands must be to one another or to the mainland...', LN, Doc. C.74, M.39, 1929, V. 2, p. 51.

[73] *Ibid,* Commentary on Art. 10, paras. 3 and 4, p. 270.

[74] Fitzmaurice pointed out that it was difficult to know what constituted a 'group of islands' since the islands might be widely scattered and the total interior distance might be very great. Sandström also referred to the difficulties arising from the great variety of situations with regard to groups of islands; *ILCYB*, 1956, Vol. I (New York, UN Publication, 1956), p. 194. See also P.Rodgers (1981), p. 71.

[75] See the UK's contention in the *Fisheries case*, 'the creation of a special regime for archipelagos ... if adopted would constitute a derogation from the freedom of the seas in the areas affected', Pleadings, Memorial of the UK, para. 120, p. 82. The USA rejected any attribution of a special regime to archipelagos pointing out that such application would lead to the restriction of the freedom of the high seas, which constitutes 'the common property of all nations'; UNCLOS I Off.Rec., Vol. III, 10th Meeting, para. 3, p. 25.

mostly interested in the freedom of navigation on the high seas. The balance between the exclusive interests of states possessing archipelagos and the inclusive interests of states interested in maintaining the freedom of navigation was certainly in favour of the latter. As it will be shown in the following subsections, the emergence of states constituted wholly by archipelagos and the pressure they exercised at the international level determined the development and consolidation of the archipelagic concept, admittedly in different terms than those suggested at the earlier stage of archipelagic proposals.

Considerations related to the political status of archipelagos were not an issue in the early discussions on the archipelagic concept. This is explicable as at that time most archipelagic features were dependent upon a mainland state. Any discussion referring to states consisting exclusively of islands was triggered by the independence of Indonesia and the Philippines and the claims they raised regarding the application of straight baselines encircling their archipelago.

In the period before UNCLOS III, the issue of the political status of the archipelago was raised by two members of the ILC in the discussions on the delimitation of the territorial sea. In particular, Sandström pointed out that states composed exclusively of islands were a completely different case than those cases examined before due to the enormous sea area that they cover and the enormous distance among the islands of the archipelago, citing Indonesia as an example.[76] He further observed that whereas 'in the main the general rule of straight baseline should be applied' this application 'could not go so far as to create a uniform territorial sea for states with enormous distances between their islands such as Indonesia'.[77] Zourek, on the contrary, was more positive in the application of the archipelagic concept to 'archipelagic states'[78] despite the geographic implications caused by their being spread in a vast maritime space. He, specifically, argued that 'it would be unfair to states composed exclusively of islands if the Commission admitted off-shore islands within the system of straight baselines, incorporating the waters between the islands and the

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[76] *ILCYB*, 1956, Vol. I (New York, UN Publication, 1956), p. 194.
[77] *Ibid.*
[78] *Ibid.* The initial use of the word 'archipelagic state' is normally attributed to the quadruple group of Indonesia, Philippines, Mauritius, Fiji and their draft on archipelagos submitted to the Sea-Bed Committee; however, Zourek used for the first time the term with the meaning which was subsequently attributed to it by the LOSC, namely a state composed exclusively of islands.

shore in internal waters and omitted to draft a similar clause for archipelagic states, for if there was no such clause, such states would never have internal waters'.[79]

However, the political status of the archipelago was not referred to as an issue in need of special treatment; the members of the ILC were in fact concerned about the geographical particularities of archipelagic states and particularly about the fact that they composed wide-spread archipelagos covering a vast maritime space.

Indeed, political implications particularly connected to the emergence of independent archipelagic states influenced the evolution of the archipelagic concept and finally its endorsement in the Law of the Sea Convention. In the following subsection, the archipelagic concept and the archipelagic regime will be scrutinised in the light of political considerations with a view to assessing the final outcome of the Third Conference on the Law of the Sea and to reaching some conclusions regarding the exclusion of dependent outlying archipelago from any special regime.

1.3 The archipelagic regime adopted at the Third Conference on the Law of the Sea

The contentious issue in the discussions on the archipelagic problem prior to UNCLOS III was the distance between the islands and the length of the straight baselines which would connect the outermost points of the archipelago in order to create a unity. This question was closely linked to the controversial issue of the breadth of the territorial sea, which was not resolved till the Third Conference on the Law of the Sea. The proposals were initially focused on a narrow application of the envisaged new regime for groups of islands. Suggestions by states, scholars and international institutions regarding the length of the straight baselines joining the outermost points of the archipelago varied from 5 miles to 12 miles and were always connected to the then proposed breadth of the territorial sea.[80] Nevertheless, the diversity of geographical types of archipelagos and the reluctance of states to acknowledge the emergence of a different regime for groups of islands impeded the advancement of a solution to the archipelagic problem until the early 1970s when the Sea-Bed Committee firstly addressed the issue.

During the seventies the shift on the international plane regarding the status of archipelagos was remarkable. What was crucial for the promotion of the idea of

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[79] *Ibid.*

[80] See J.J.G. Syatauw (1973), p. 105; See also D.P. O'Connell (1971), p. 1

archipelagos having a special status in the international law of the sea was the emergence of newly independent archipelagic states. It is true that during the colonial era, the majority of states were 'solidly land-based' and thus not interested in adopting a special regime for archipelagos,[81] as this would mean the restriction of the freedom of the seas; imperialist powers that possessed archipelagos did not apply any special system for the archipelagos[82] but instead 'subordinated local interests to considerations of the freedom of the seas, open communications and access to riches of the world'.[83] Moreover, midocean archipelagos were largely under colonial rule and had, therefore, no international status or voice.[84] Upon their independence these states started playing a leading role in the formation and finally adoption of the archipelagic regime within the LOSC. Moreover, these states tried to advance their claims in a way distinct from previous discussions on archipelagos stressing their special nature and particularly their fragile newly-acquired independence.

Indeed, the group of archipelagic states consisting of Fiji, Indonesia, Mauritius and the Philippines with Bahamas cooperating closely was an important and influential group.[85] The main core of this interest group had meetings in New York, Geneva and Manila during the negotiations; they also had meetings with other regional groups such as the Afro-Asian Legal Consultative Committee in 1971 and 1972.[86] Their common interest was to ensure that the Convention would adopt a special regime for archipelagic states according to which the whole of an archipelago would be encircled by straight baselines and the state would exercise sovereignty over the enclosed waters. The needs and interests of this group of states gave the archipelagic concept a whole new direction within the Conference.[87]

Another factor conducive to the recognition of archipelagic claims was the change in the composition of the international community due to the decolonisation process. [88] Emergent independent developing states supported the claims raised by

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[81] *Ibid*, p. 104.
[82] R.P.Anand, 'Mid-ocean Archipelagos in International Law: Theory and Practice', 19 *Indian Journal of International Law* (1979), p. 247.
[83] D.P.O'Connell (1971), p. 75.
[84] R.P.Anand (1979), p. 229. See also J.J.G.Syatauw (1973), p. 104-5.
[85] M.H.Nordquist (ed), *United Nations Convention on the Law of the Sea 1982: A Commentary*, Vol. I (Dordrecht: Martinus Nijhoff Publishers, 1985), p. 77
[86] A.Dale, 'Archipelagos and the Law of the Sea: Island straits states or island-studded sea space?', 2 *MP* (1978), p. 53.
[87] J.J.G.Syatuaw (1973), p. 108.
[88] In UNCLOS I the participating states numbered 86, among which 26 were western states, 10 socialist states, 20 Latin-American states, 24 Asian and 6 African. On the contrary, in 1974 the state

archipelagic states, which were themselves ex-colonies like Indonesia, Philippines, Fiji etc,[89] and contributed to the recognition of the need for the provision of a special legal regime for these states.[90] In the Conference, most developing states clearly expressed their view that the archipelagic regime would promote economic development for the archipelagic states.[91] Much of the argumentation in favour of the archipelagic regime was focused on the need of developing archipelagic states to exploit their natural resources as a means of economic development.[92] There was a strong belief among states that the solution regarding archipelagos was interconnected with the issue of the economic development of the newly independent archipelagic states and subsequently with the decolonisation process. Archipelagic states took advantage of the major influence the 'Group of 77' had in the Conference due to the number of the members of this group and its coherence[93] and pressed for the creation of a regime, which would at least 'fit' their geographical configuration and satisfy their national interests. In this sense, it was not surprising that the archipelagic regime acquired a political connotation and was finally adopted only for independent states composed entirely of archipelagos.

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representation in the Conference numbered 164 states; the number of developing states coming from Asia and Africa had enhanced their participation in the Conference. In particular, the Asian states including the states in the Pacific Ocean were 43 and the African states were 50. For the state participation in the Third Conference see Final Act of UNCLOS III in K.R.Simmonds, *The UN Convention on the Law of the Sea* (1983, N.York, Oceana Publ. Inc). For the 1959 Geneva Conference on the Law of the Sea and comments on the participation of states see J.J.G.Syatuaw (1973), p. 108.

[89] Kusumaatmadja characteristically stated in 1972 that 'the case for a special regime of archipelagos has recently gained new adherents among the members of the world community'. M.Kusumaatmadja, 'The Legal Regime of Archipelagos: Problems and Issues', in Lewis M. Alexander (ed), *The Law of the Sea: Needs and Interests of Developing Countries: Proceedings of the Seventh Annual Conference of the Law of the Sea Institute University of Rhode Island* (Kingston: University of Rhode Island, 1973), p. 166.

[90] Before the commencement of the Conference the Organisation of African Unity had recognised the special position of archipelagos in 1973 in Addis Ababa and again in 1974 in Mogadishu. In the same framework, the League of Arab States also recommended that an archipelago's unity be conserved and its 'geographical and political survival' be assured. UNCLOS III, Off. Rec., Vol. II, Second Committee, 37th Meeting, para. 36, p. 269, para. 25, p. 268 respectively.

[91] Jayawardene stated that '... the archipelagic claims, advanced mainly by developing states, each aspiring to attain a degree of development and prosperity for its peoples, in an atmosphere free of external pressures, whether of a political, military, economic or depredatory nature must command the sympathetic consideration of the community. It is this conviction which has drawn to archipelagic claims an aura of respectability and the prospect of a successful enshrinement of the concept of a special legal order';H.W.Jayawardence (1991), p. 111-2

[92] The recognition of the right of ex-colonial people over their natural resources was also an important issue in the decolonisation process. See GA Res. 1803 (XVII) 'Permanent Sovereignty over Natural Resources'. See also GA Resolution 1514 (XIV) of 14 December 1960 'Declaration on the Granting of Independence to Colonial Countries and Peoples'.

[93] Churchill and Lowe point out that the 'group of 77' 'whose coherence is remarkable in view of the diversity of its members, achieved a notable diplomatic triumph in leaving its imprint clearly upon the Convention text', R.R.Churchill & A.V.Lowe (1999), p. 17.

The change in the consideration of the archipelagic concept coincided with the time when the Sea-Bed Committee firstly took up the issue of drafting a Convention which would be used as an instrument for UNCLOS III.[94] In the list of subjects and issues relating to the law of the sea approved by the Committee the issue of archipelagos was listed as item 16.[95] It was the first time that a codification Conference on the Law of the Sea treated archipelagos as a separate issue.[96] The archipelagic problem was dissociated from the issue of the delimitation of the territorial sea and from the issue of baselines. The dissociation of the archipelagic question from previously suggested solutions was mostly due to the desire of archipelagic states to base their claims not only on geographical reasons but also on political considerations. This dissociation may have also reflected the desire of maritime states to negotiate the proposed regime - particularly with regard to the status of the enclosed waters - on different terms than those suggested previously according to which the use of straight baselines would lead to the internalisation or territorialisation of the enclosed waters.

Before presenting the attributes of the archipelagic regime as enshrined in Part IV of the LOSC, an overview of the reasons in support of the archipelagic regime will be presented. It was mentioned in the first Part of this Chapter that the application of straight baselines to groups of islands was advanced as a method for attaining enhanced jurisdiction over the waters between the islands mostly on the basis of geographical reasons referring to the compact nature of the group. During UNCLOS III, the reasons advanced in support of the archipelagic concept were not only geographical but concerned the economic, political and environmental protection of archipelagos.

A. Reasons in support of the archipelagic regime

Archipelagic states and states possessing archipelagos used the principles identified by the ICJ in the *Fisheries case* adjusting them to the geographic particularities of outlying archipelagos and enriching them with various other reasons referring to the special needs of archipelagos. Geographical and historical reasons,

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[94] See GA's Resolution 2340 (XXII) of 18 December 1967; GA Res. 2750 of December 1970; GA Off.Rec., 26th Session, Suppl. No 21 (A/8421), para. 1, p. 1); see also Oda, *The Law of the Sea in our time II – The United Nations Sea-Bed Committee* 1968-1973, (Leyden: Sijthoff Publications on the Ocean Development, 1977, p. 156-7).

[95] GA Off.Rec. Twenty-seventh Session, Supplement No. 21(A/8721), chap. I, para. 23, p. 8.

[96] P.E.J.Rodgers (1981), p. 138. In August 1972, the Committee formally approved the list of subjects and issues relating to the law of the sea; the issue of archipelagos was listed as item 16. *Ibid*, Twenty-seventh Session, Supplement No. 21(A/8721), chap. I, para. 23, p. 8.

economic interests, political and social factors, environmental and ecological considerations were among the most common.[97] Most of these factors were interrelated and interconnected in the arguments of archipelagic states and states possessing archipelagos.[98]

Geography plays the predominant role in the archipelagic concept, as it is the geography of the islands, which determines the archipelago.[99] The very essence of the concept is the geographical morphology of the archipelago; the islands forming the archipelago are all part of a single common submarine platform[100] and are located in such a vicinity to each other so as to justify their consideration as a unit.[101] Thus, it was argued that it is the special relationship between the land territory and the intervening waters that gives states the entitlement to exercise the same authority over the maritime area, as they would do over their internal waters.[102]

Economic considerations referring to the exploitation of the natural resources of the waters of the archipelago were one of the main arguments advanced by archipelagic states in support of the adoption of the archipelagic concept.[103] Much of the argumentation in favour of the archipelagic regime was focused on the need of archipelagic states, which were developing states, to exploit their natural resources as a means of economic development.

Of equal importance were political concerns referring to the internal and external security of the archipelago. It was argued that the incapacity of the state to control a

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[97] Delapenna referring to the archipelagic claim raised by the Philippines grouped the reasons behind archipelagic claims 'under the two headings commonly used for the justification of exceptions to general international legal limitations on sovereignty over water areas – historical title and vital interests'; J.W.Dellapenna, 'The Philippines Territorial Water Claim in International Law', 5 *Journal of Law and Economic Development* (1970), p. 50. Dubner referred to two categories of special interests that archipelagic states have that is (a) natural resources eg fishing and minerals; (b) non-natural resources – customs, fiscal policy, immigration, sanitation, communications (both internal and external), illegal entry of aliens and pollution control; B.H.Dubner (1976), p. 67.

[98] Indonesia for example repeatedly stated that the concept of an archipelagic state is essential to the national unity, political stability, economic, social and cultural cohesiveness and territorial integrity of the state; see UNCLOS III Off.Rec., Vol. II, 36th Meeting, para. 1-2.

[99] A.Dale (1978), p. 47

[100] *Ibid*, p. 48.

[101] O'Connell argued that the archipelagic doctrine is in fact an expression of the basic scientific and legal reality that the land and sea interact; D.P.O'Connell (1971), p. 58.

[102] P.E.J.Rodgers (1981), p. 117. This view was also dominant in the reasoning of the International Court of Justice in the 1951 *Fisheries case*. The Court stated that 'another fundamental consideration, of particular importance in this case, is the more or less close relationship existing between certain sea areas and the land formations which divide or surround them'; *Fisheries case, ICJ Rep. 1951*, p. 133.

[103] The significance of the economic considerations of an archipelago is depicted vividly in the speech of the representative of Fiji during UNCLOS III: 'Archipelagic peoples were farmers of the seas and the sea-bed': UNCLOS III Off.Rec., Vol. I, 29th Meeting, para. 44-50. See also M.Kusumaatmadja (1973), p. 175. See also J.W.Dellapenna (1970), p. 52 (on Philippines).

vulnerable maritime space, namely the area surrounding its land, could have severe consequences upon its national safety and territorial integrity.[104] A state's attempts to protect the fragile security of the archipelago against external threats would be facilitated if foreign vessels, especially warships, did not have access at any time to the waters of the archipelago.[105] Similarly, with regard to issues of internal security, the archipelago is susceptible to illegal actions, such as trafficking, illegal immigration, smuggling committed by foreign vessels, which may avoid prosecution by fleeing to the high seas inside the archipelago where the state has no jurisdiction.[106]

The environmental aspect concerning the protection of the waters of the archipelago from pollution and from degradation of the marine environment was also of major concern to archipelagic states and archipelagos forming part of a continental state. All claimants emphasised the danger of pollution by accidents involving oil tankers or nuclear powered vessels.[107] It was argued that the random configuration of the islands would lead to the concentration of pollution sources within the waters of the archipelago, as there are no channels for the polluted waters to wash away.[108]

B. The main discussions on archipelagos and the archipelagic regime adopted in UNCLOS III

In this subsection, the attributes of the archipelagic regime as enshrined in Part IV of the LOSC are presented and assessed with an emphasis on the differences from previously suggested solutions and on the trade-offs achieved during the negotiations

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[104] See the arguments raised by the Indonesian delegate during UNCLOS III: 'Sovereignty and exclusive jurisdiction over those waters are vital to archipelagic states not only to their economy but also to their national security and territorial integrity. UNCLOS III Off.Rec., Vol. I, 31st Meeting, para. 47-53. Syatuaw also pointed out that the use of the sea for military purposes as well as the submarines which travel submerged carrying missiles with nuclear warheads have led to the growing concern among ocean surrounded archipelagos, J.J.G.Syatauw (1973), p. 109.

[105] C.F.Amerasinghe (1974), p. 557.

[106] See J.R.Coquia (1962), p. 155, H.W.Jayawardene (1990), p. 108; see the statement of the Indonesian delegate, A.Tolentino in UNCLOS II Off.Rec., 5th Meeting, para. 20-1, p. 51; W.T.Burke, *Contemporary Law of the Sea: Transportation, Communication and Flight* (Rhode Island Law of the Sea Institute Occ. Papers No. 28, p. 5.

[107] See Lee, 'An archipelagic claim for Papua-New Guinea' 2 *Melanesian Law Journal* (1974), p. 103. The Peruvian delegate pointed out the linkage between the technological progress and the development of the concept of archipelagic seas stating that there was 'the need for more stringent protection against the risks deriving from advanced technology, particularly with regard to nuclear-powered ships and submarines; UNCLOS III Off.Rec., Vol. II, Second Committee, 37th Meeting, para. 21-24. See also the arguments raised by Ecuador during UNCLOS III: *ibid*, Vol. XIII, 126th Meeting, para. 115. See also Vol. XVII, 190th Meeting, para. 196. Of great importance was this issue for coral archipelagos, that is groups of islands, which are based on the top of a coral formulation of the seabed, such as Fiji, Bahamas and the Maldives; see D.P.O'Connell (1971), p. 54.

[108] A.Dale (1978), p. 48 ; R.P.Anand (1979), p. 242

of the Conference. It should be mentioned at the outset that the core of previous suggestions, namely the application of straight baselines joining the outermost islands of the archipelago, was endorsed; indeed, the main attribute of the archipelagic regime is the right of states to 'draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago'.[109] It is obvious by the use of both the words 'straight' and 'archipelagic' in this article that these baselines are technically straight, in the sense that they join appropriate basepoints on the coast and that the territorial sea is measured from them, but the use of the word 'archipelagic' signifies that they constitute a different category of baselines particularly regarding the regime of the enclosed waters.

The issues upon which the discussions in the Sea-Bed Committee and UNCLOS III focused concerned the determination of archipelagos qualifying for the application of the archipelagic regime and secondly the exact content of the regime, particularly with an emphasis on the rights to be exercised within the enclosed waters by third states. With regard to the first issue, two questions had to be answered: the first concerned the type of archipelagos which would benefit from the application of the archipelagic regime, particularly concerning the question of whether the archipelagic regime would be applicable to all archipelagos or to archipelagic states, that is states composed entirely of islands. The second question referred to the exact conditions for the application of the archipelagic baselines.

It is true that the most controversial issue during the discussions concerned the legal regime of the enclosed waters and the rights of other states within these waters whereas the issue of the archipelagos qualifying for the archipelagic regime particularly concerning their political status received little consideration. However, all the issues under negotiation referring to the archipelagic regime were interconnected and influenced the outcome of the Conference regarding both the content of the archipelagic regime and the determination of its beneficiaries.

I. Determination of archipelagos qualifying for the application of the archipelagic regime

(a) Distinction on the basis of the political status of archipelagos

By virtue of Part IV of the LOSC as adopted in UNCLOS III only archipelagic states, defined in article 46 (1) as states 'constituted wholly by one or more

[109] Article 47 (1) LOSC.

archipelagos and may include other islands' may draw archipelagic baselines enclosing the waters of their archipelagos.[110] Outlying archipelagos forming part of the territory of continental states are thus excluded from the application of the archipelagic regime. The present subsection traces the reasons which led to the adoption of this distinction by reviewing the negotiations both in the Sea-Bed Committee and in UNCLOS III and the views advanced by the participant states.

As analysed above, before the commencement of the discussions on archipelagos in the Sea-Bed Committee, all proposals referred to all types of archipelagos regardless of their political status. It was in the drafts submitted in the Sea-Bed Committee by the quadruple group of archipelagic states and by the UK, that the proposed regime was envisaged to apply solely to archipelagic states,[111] which were therein defined as states 'constituted wholly or mainly by one or more archipelagos'[112] or as states 'where the land territory ... is entirely composed of three or more islands'.[113] On the contrary, China submitted a proposal prescribing the application of the archipelagic regime to all archipelagos regardless of their political status.[114] These two approaches were incorporated in the Variants adopted by the Sea-Bed Committee, which composed a basis of discussion for the Third Conference on the Law of the Sea. [115]

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[110] The phrase 'and may include other islands' was drafted to reflect the geographic particularities of some archipelagic states, which apart from the main archipelago possess islands situated at a distance from the main archipealgo; Fiji for example has some islands, Cevi-I-Ra and Rotuma, situated far from the main Fijian archipelago.

[111] Proposals submitted by other states made reference to the application of straight baselines to archipelagic states without however clarifying the meaning of archipelagic states; see the draft articles submitted by the Organisation of African Unity (GA Off.Rec., Twenty-eighth Session, Supplement No. 21(A/9021), Vol. II, Annex VI, Chap. 2 (originally issued as A/AC.138/89), p. 4 –5), by Uruguay (*ibid.*, Twenty-eighth Session, Supplement No. 21(A/9021), Vol. II, Annex VI, Chap. 2 (originally issued as A/AC.138/89), p. 4 –5) and by Ecuador, Panama and Peru (*Ibid,* Chap. 16, Section II, Art. 3 (originally issued as A/AC.138/SC.II/L.27 And Corr. 1 and 2), p. 30); see following footnote with regard to the ambiguity in the use of the term archipelagic states.

[112] GA Off.Rec., Vol. III, Annex II, Appendix V, Chapter 38 (originally issued as A/AC.138/SC.II/L.48), p. 102-5. In a previous draft (Twenty-seventh Session, Chap. 1, para. 23, originally issued as document A/AC.138/SC.II/L.15) of the same group of states despite the fact that there was a reference to archipelagic states as beneficiaries of the special regime there was no definition of what an archipelagic state was. The term archipelagic state at that time was indeed ambiguous. For example, Amerasinghe in his article on archipelagos in 1974, clarifies that references to 'archipelagic States' in his study are to states with midocean archipelagos; C.F.Amerasinghe (1974), p. 540 (footnote 2). Dubner also remarks that both archipelagic states and non archipelagic states are using the term 'archipelagic states', B.H.Dubner (1976), p. 65. See also the statement of the Canadian delegate at the beginning of the First Session of the Conference, *infra* note 151. It was indeed the ambiguity of the term that led to the introduction of a definition of an archipelagic state in the second draft submitted to the Sea-Bed Committee by the group of the archipelagic states.

[113] Ibid, Chapter 33 (originally issued as A/AC.138/SC.II/L.44), p. 99-100.

[114] GA Off.Rec., Twenty-eighth Session, Supplement No. 21(A/9021), Vol. III, annex II, appendix V, Chap. 23 (originally issued as A/AC.138/SC.II/L.34), p. 72.

[115] *Ibid*, Vol. IV, Annex. II, Appendix VI, chap. 16, p. 156-160.

It is interesting to note that the UK's draft proposal while limiting the application of the envisaged regime to archipelagic states, included a provision (paragraph 10) on archipelagos forming part of a continental state stating that 'the provisions of this article are without prejudice to any rules of this Convention and international law applying to islands forming an archipelago which is not an archipelagic State'.[116] Though vague, this provision constitutes evidence of UK's willingness to accept that this category of archipelagos has or should have a certain status within the law of the sea outside the framework of the Convention.

During the main debate regarding archipelagos in UNCLOS III,[117] states possessing archipelagos, such as Ecuador, Greece, Spain, India, China, Argentina, Portugal, France, Canada, Australia, Honduras pressed for the extension of the regime recognised for archipelagic states to archipelagos forming part of a continental state. Despite the fact that these states had vital common interests and common objectives regarding the acceptance of a special regime for their midocean archipelagos, they did not form a stable and rigid 'coalition' for the better advancement of their interests. The links between these states were not strong and they did not cooperate closely for the realisation of their goal. It is characteristic that these states did not present a common draft proposal advancing the idea of a regime for dependent archipelagos.

Some of these states indeed co-sponsored or supported a working paper according to which both archipelagic states and archipelagos forming part of a continental state would benefit from a special archipelagic regime consisting in the right of a state to draw straight baselines joining the outermost points of the archipelago.[118] This draft proposal was rather confusing in the sense that it referred to the application of straight baselines – already provided for archipelagic states in a

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[116] *Supra* note 113.

[117] UNCLOS III Off.Rec., Vol. II, 36th & 37th Meetings, p. 260-273.

[118] *Ibid*, Vol. III, Doc. A/CONF.62/L.4, p. 82-3. This working paper was submitted by Canada, Chile, Iceland, India, Indonesia, Mauritius, Mexico, New Zealand and Norway. The enclosed waters were referred to as archipelagic and the right of innocent passage was recognised in favour of third states' vessels. It was indicated though that a further provision was required with regard to the regime and description of passage through specified sea lanes of the archipelagic waters. It is important that the above draft articles extending the archipelagic regime to dependent archipelagos was co-sponsored by two members of the group of archipelagic states, Indonesia and Mauritius. This shows that, at least, at this initial stage of the Conference, archipelagic states were not opposed to the application of the archipelagic regime to archipelagos forming part of a continental state. Nevertheless, after the first discussions in the second Committee of the Conference they realised that the application of the new regime on archipelagic states was more or less widely accepted, while at the same time there were strong objections to the recognition of the same rights to states possessing an archipelago; they, accordingly, supported the working paper that had a better prospect of success, which provided for the application of the new regime solely to archipelagic states. See E.D.Brown (1994), p. 123.

previous section of the same draft - to the case of coastal states with one or more *off-lying* archipelagos. The use of the term *off-lying* was rather misleading as it would normally refer to archipelagos lying close to a mainland coast. Presumably, this draft proposal was meant to apply both in the case of archipelagos lying close to a mainland coast – in cases, however, where the application of straight baselines for coastal archipelagos was inapplicable[119] – and archipelagos lying in a considerable distance from the coast. It was not, however, specified whether in the first case the system of straight baselines would join the archipelago to the closely located mainland coast. This may reveal an uncertainty with regard to the use of terms referring to dependent archipelagos stemming from the fact that continental states possessing archipelagos had not collaborated for the presentation of a viable and clear proposal.

Greece, for example, in her draft articles submitted to the Committee treated the issue of archipelagos within the provisions of baselines and stressed that straight baselines should be applied *inter alia* in the case of archipelagos.[120] Ecuador submitted a draft proposal on archipelagos according to which the method of straight baselines prescribed for archipelagic states for the measurement of their territorial sea should also apply to archipelagos forming part of a continental state.[121] Moreover, Ecuador in some instances referred explicitly to the need for an adoption of a special regime for the Galapagos on the basis of its special ecological character.[122]

However, the promotion and final acceptance of most of the issues during UNCLOS III were due to the pressure exercised by interest groups particularly within the framework of informal private consultations.[123] It was to the detriment of states

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[119] This was clarified in article 10 of this draft proposal where it was provided that 'the provision regarding archipelagos forming part of a coastal state shall not affect the established regime concerning coastlines deeply indented and cut into and the waters enclosed by a fringe of islands along the coast as expressed in article 4'.

[120] UNCLOS III Off.Rec., Vol. III, Doc.A/CONF.62/C.2/L.22, p. 200-1.

[121] *Ibid*, Doc. A/CONF.62/C.2/L.51, p. 227.

[122] *Ibid*, Vol. II, 37th Meeting, p. 267, para. 18. Similarly, the delegate of Ecuador stated in the Ninth Session of the Conference that the Convention should contain appropriate provisions on the Galapagos archipelago which UNESCO had declared a cultural heritage of mankind, to ensure that its unique natural wealth was preserved and the unity of its ecological system was respected; for the same reasons the archipelago should be subject to the same treatment as archipelagic states with regard to the baseline system for the delimitation of their maritime space'. *Ibid*, Vol. XIII, 126th Meeting, para. 115, p. 19. See also *ibid*, Vol. XVII, 190th Meeting, para. 196 where the delegate of Ecuador stressed that 'the seas surrounding the Galapagos Islands, which because of their exceptional wealth of flora and fauna have been described by UNESCO as the 'natural heritage of mankind', deserve special treatment one which takes account of the circumstances and allows them to preserve their natural wealth for posterity'.

[123] See *infra* p. 48 for the contribution of informal consultations. The main influential draft proposal which constituted the basis of the discussions during UNCLOS III, was the draft submitted by the group of archipelagic states which provided for the application of the system of straight archipelagic baselines solely to states composed of one or more archipelagos. *Ibid*, Doc.A/CONF.62/ C.2/L.49, p. 226-7. In

possessing archipelagos that they did not appear to form an interest group or that they did not participate in the interest group of archipelagic states, being therefore excluded from the informal negotiations.

On the other hand, states neighbouring archipelagos which belong to other states raised very serious objections. Turkey (neighbouring the Aegean archipelago),[124] Thailand[125] and Burma[126] (neighbouring India's Andaman and Nicobar Islands in the Indian Ocean) pressed firmly for the exclusion of archipelagos belonging to a continental state from the new regime on archipelagic states. Bulgaria and Pakistan also stated explicitly their opposition to the application of the archipelagic regime to archipelagos belonging to a continental state.[127]

The group of Maritime Powers consisting of France, Japan, the United Kingdom, the USA and the USSR,[128] was very influential during the Conference with strong links and regular consultations among its members. With the exception of France, which was interested in an archipelagic regime for her archipelagic dependencies, all the other great maritime powers opposed the application of any special regime to archipelagos forming part of a continental state. Maritime powers were reluctant to see areas of high seas being attributed to the sovereignty of a continental state, which would impair the freedom of navigation, international trade and national security.[129] While they did accept the notion of archipelagic states and a special regime for the delimitation of their maritime zones - though they pressed till the end and they finally succeeded in the recognition of the right of innocent and of archipelagic sea lane

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another draft proposal submitted by Bulgaria, the German Democratic Republic and Poland, the application of straight baselines was restricted to archipelagic states. *Ibid*, Doc.A/CONF.62/ C.2/L.52, p. 228.

[124] In particular, the Turkish delegate declared that 'if no clear distinction could be drawn between the two categories, his delegation would have to reserve its position on the problem'. *Ibid*, 39th Meeting, para. 29 and 42, p. 169-170.

[125] *Ibid*, 36th Meeting, para. 70, p. 265.

[126] *Ibid*, 37th Meeting, para. 7, p. 266.

[127] For Bulgaria see *ibid*, 36th Meeting, p. 21; Pakistan referred to cases of enclosed or semi-enclosed seas and stated that 'the extension of that concept to archipelagos belonging to continental states would create great hardship to the other states of the area', 37th Meeting, para. 51.

[128] At the final years of the Conference the Federal Republic of Germany replaced the USSR in a group called the Co-ordinating Group of Five; M.H.Nordquist (1985), p. 79-80.

[129] C.F.Amerasinghe (1974), p. 544. See also J.A.Roach & R.W.Smith, *United States Responses to Excessive Maritime Claims* (2nd Ed) (The Hague, Martinus Nijhoff Publishers, 1996), p. 20, who point out that the maritime States were willing to accept the archipelagic concept as long as its application was limited and precisely defined and the rights of navigation and overflight were not impeded; see also J.P.Bernhardt, 'The Right of Archipelagic Sea Lanes Passage: A Primer', 35 *VJIL* (1994-5), p. 721.

passage within archipelagic waters[130] - they did not intend to see this regime being extended to archipelagos forming part of a continental state.[131]

The rest of the states supported the application of the new regime to archipelagic states, but still they did not raise any serious opposition to the extension of this regime to archipelagos forming part of a continental state, remaining silent on this issue.[132] The bulk of states were mostly interested in seeing the right of innocent passage being assured within archipelagic waters.[133]

In the single working paper prepared by the Second Committee[134] provisions 202 and 204 contained formulae reflecting the views advanced by states during the preceding discussions providing either for the attribution of the archipelagic regime solely to archipelagic states or extending its application to archipelagos belonging to continental states.[135]

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[130] See the Soviet representative's statements: 'International rules should be drafted to take account of the interests of archipelagic states which should however state clearly and unequivocally that they in return, were prepared to take account of the interests of other states. The regime of the waters of archipelagic states should be established in conjunction with a settlement providing for free transit passage along the shortest routes through archipelagic states and waters traditionally used for international navigation'. UNCLOS III Off.Rec., Vol. II, 37th Meeting, para. 11, p. 267; see also Japan (36th Meeting, para. 16); UK (36th Meeting, para. 19).

[131] The position of the representative of the USSR during the 37th Meeting reflects the views of maritime powers regarding their persistence on the doctrine of the freedom of the high seas. The Soviet delegate stated that the Committee should not deal in that connection with questions concerning archipelagos off the coast of mainland states, which formed part of their territory. He added that he would oppose any proposal for any regime for such archipelagos or islands, which would differ from that applied to the mainland state. Any attempts by individual mainland states to draft provisions for a special regime for such archipelagos were completely unjustified. Such attempts could lead to arbitrary action in many parts of the ocean, interference with navigation and extension of rights over large areas of the high seas, which would hardly promote progress and the strengthening of peace and understanding between peoples; UNCLOS II Off.Rec., Vol. II, 37th Meeting, para. 14, p. 267. The representative of the US did not formally express his opinion regarding archipelagos during the sessions of the Second Committee in UNCLOS III; nevertheless, the American position regarding this issue was well known by the objections raised by the US government to the announcement of the archipelagic claims by the Philippines in 1955 and Ecuador in 1951; see M.Whiteman (1974), p. 282, 283, 287. What is more, the US advanced its views on archipelagos in the interest groups' meetings during UNCLOS III; see P.E.J.Rodgers (1981), p. 173-4, who presents an outline of the American position during the work of the Informal Working Group on Archipelagos.

[132] P.E.J.Rodgers (1981), p. 182.

[133] See the UNCLOS III Off.Rec., Vol. II, 36th Meeting & 37th Meeting, pp. 260-273.

[134] *Ibid,* Vol. III, Doc.A/CONF.62/L.8/Rev.1, Appendix I: Working Paper of the second Committee: Main Trends (originally issued as Doc.A/CONF.62/ C.2/WP.1), pp. 136-8. The document was titled 'Working paper of the second Committee: main trends' and the provisions on archipelagos composed Part X

[135] Formula A of provision 202 read as following: 'These articles apply only to archipelagic states'. On the contrary, in Formula B and C of the same provision there was an explicit reference to the application of the rules applied on archipelagic states to archipelagos forming part of a continental state. In particular, Formula B provided that 'a coastal State with one or more off-lying archipelagos, as defined in article .... (Provision 203, formula A, paragraph 2) which form an integral part of its territory, shall have the right to apply the provisions of articles ... to such archipelagos upon the making of a declaration to that effect'. Formula C provided that 'the method applied to archipelagic States for the drawing of baselines shall also apply to archipelagos that form part of a State, without entailing any

The single working paper composed the basis for the discussions in informal working groups created with the objective to discuss specific issues in greater detail. In fact, the Conference 'showed a marked preference to work in informal meetings without records and closed to the public, as it was thought that delegations would adopt a more flexible approach to the issues discussed'.[136] The informal Working Group on Archipelagos, comprised of the group of archipelagic states and that of the maritime powers[137] determined the outcome of the negotiations. Continental states possessing archipelagos – despite their interest in this issue - did not participate in these informal discussions. Ecuador, for example, 'complained' in the Resumed Eighth Session of the Third Committee in 1979 about the exclusion of his delegation as well as other delegations from the participation in various interest groups.[138] In the formal and private meetings[139] the issue of dependent outlying archipelagos was not discussed; discussions were focused on the thorny issue of the right of passage through archipelagic waters and the specific conditions for the application of the archipelagic regime.[140]

Following these discussions, the single negotiating text prepared by the three Committees at the third session of the Conference[141] included two sections referring to archipelagos: section 1 on archipelagic states and section 2 (which had only one article numbered 131) on oceanic archipelagos belonging to continental states. Section 2 provided that 'the provisions of section 1 are without prejudice to the status of oceanic archipelagos forming an integral part of the territory of a continental state'.

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change in the natural regime of the waters of such archipelagos or of their territorial sea'. Formula C of the provision 204 referred also to the right of a continental state to draw straight baselines along the outermost points of the outermost islands and drying reefs of its archipelago.

[136] M.H.Nordquist (1985), p. 92.

[137] The following archipelagic states and maritime powers participated in the Informal Working Group on Archipelagos: Fiji, the Bahamas, Indonesia, the Philippines and on one occasion, Papua New Guinea, Japan, the Soviet Union, the United Kingdom and the United states. See P.E.J.Rodgers (1981), p. 173.

[138] UNCLOS III Off.Rec., Vol. VII, 1979, 42nd Meeting, p. 44.

[139] The unofficial negotiating process of the Conference, even secret sometimes, consisted of meetings of the interest groups, of events taking place outside the Conference as well as of meetings of informal private negotiating groups, *ibid*, p. 104; on 'private groups' and on 'secret groups' see p. 105-112. See also UNCLOS III Off.Rec., Vol. IV, Document A/CONF.62/C.2/L.89/Rev.1, para. 8 and 18, p. 196. Among such negotiating groups, those particularly relevant to the question of archipelagos were: (a) Private Working Group on Straits used for International Navigation, with the representatives of Fiji and the UK serving as co-chairman; (b) Informal Consultative Group on Straits, with a vice-chairman of the Committee as chairman; (c) Small Group on Archipelagos, with the Chairman of the Second Committee as chairman. See United Nations Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Archipelagic states: Legislative History of Part IV of the United Nations Convention on the Law of the Sea* (New York: UN Publ., 1990), p. 121.

[140] P.E.J.Rodgers (1981), p. 173-177.

[141] UNCLOS III, Off.Rec., Vol. IV, Doc.A/CONF.62/ WP.8/Part II, pp. 168-170.

Article 131 was a vague provision regarding the status of archipelagos forming part of a continental state. In fact, it formed a new provision, which was not based on a previous draft proposal by any of the participating states during the Conference; however, it resembled paragraph 10 of the draft provision submitted by the UK in the Sea-Bed Committee which read 'the provisions of this article are without prejudice to any rules of this Convention and international law applying to islands forming an archipelago which is not an archipelagic State'.[142] In essence, it reflected a compromise, as during the formal and informal meetings of the Committee the views of the states were conflicting.[143] The meaning of this article was, however, ambiguous.[144] It provided that the provisions on archipelagic states were not to be applied to midocean archipelagos forming part of a continental state but it was arguably implied that these archipelagos composed a special category that could have a special status in international law; however, no specific criteria or other characteristics had been developed for the recognition of this special regime and no reference was made to the rights of these oceanic archipelagos.

The vagueness of article 131 and the implications for its interpretation[145] led to its deletion[146] from the revised single negotiating text.[147] The scope of the Convention was thus limited to archipelagic states; any other mentioning to archipelagos belonging to a continental state was also erased from the revised single negotiating text.

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[142] GA Off.Rec., *supra* note 101.

[143] *UN Legislative History of Part IV of the United Nations Convention on the Law of the Sea*, Observations on article 131, p. 82.

[144] Rodgers contends that this badly drafted provision was subject to varying interpretations but subsequent discussions, which led to the deletion of this provision in the Revised Single Negotiating Text, showed that this provision 'was meant to exclude rather than include groups of islands belonging to continental states', P.E.Rodgers (1981), p. 178 esp. footnote 37 in page 225; Knight and Chiu, on the contrary, found that this provision could be interpreted as giving continental states the right to apply the 'so-called archipelagic principle to their archipelagos': G.Knight & H.Chiu, *The International Law of thte Sea: Cases, Documents and Readings* (N.York: Elsevier Science Pub. & Unifo Publ., 1991), p. 97; the same is argued by Mani: V.S.Mani (1980), p. 103. Stevenson & Oxman commening on the progress of the negotiations during the Geneva Session stated that the purpose of article 131 was 'unclear'. J.R.Stevenson & B.H.Oxman, 'The Third UNCLOS: The 1975 Geneva Session', 69 *AJIL* (1975), p. 785.

[145] P.E.J.Rodgers (1981), p. 182-3.

[146] The deletion of article 131 was suggested among others by the Federal Republic of Germany in an informal paper; R. Platzöder, *Third United Nations Conference on the Law of the Sea: Documents*, Vol. IV, (New York: Dobbs Ferry, 1982), p. 340.

[147] *Ibid*, Doc. A/CONF.62/WP.8/Rev.1/PartII, Chap. VII, p. 170-2. The title of Chapter VII of the negotiating text also changed to 'archipelagic states' and paragraph one of article 117 (article 118 of the revised negotiating text) of the previous informal negotiating text, which read 'The provisions of this section shall apply to archipelagic States' was erased as a result of the deletion of section 2. *UN Legislative History of Part IV of the UN Convention on the Law of the Sea: Archipelagic states*, p. 86.

The archipelagic regime, as will be analysed shortly, was a compromise between the conflicting interests of two highly influential groups: the archipelagic states and the group of the major maritime powers.[148] With regard to the issue of dependent outlying archipelagos, archipelagic states were rather indifferent as they were only interested in the adoption of an archipelagic regime that would cover the geographic features of the archipelagic states that participated in the Conference.[149] The major maritime powers, on the other hand, did not want to see larger parts of the high seas being attributed to continental states. As Brown points out 'the distinction drawn in the UN Convention between archipelagic States and archipelagos is more the result of the opposition of the principal maritime powers to the proliferation of archipelagic waters than of any objective consideration of the need to unify the scattered parts of the non-State archipelago'.[150] Lastly, the states having a national interest in the case of archipelagos belonging to a coastal state were numerically few and not really influential. Most of the decisions reached at the end were a result of negotiations among interest groups comprised of highly influential states – in the case of archipelagos between archipelagic states - supported by developing states - and great maritime powers[151].

Moreover, the package deal approach adopted by the Conference as a means of facilitating concessions on behalf of states in a variety of issues influenced also the negotiations regarding the question of archipelagos. Of particular importance was for maritime states the maintenance of navigational rights in the waters of archipelagos particularly through straits of international navigation. Indeed, the issue of archipelagos was discussed in the negotiations held in unofficial and private groups

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[148] See *supra* p. 33 and 42-3 for the composition of these highly influential interest groups. O'Connell predicted in his article on midocean archipelagos in 1973 the outcome of the negotiations regarding the archipelagic regime by stating in his conclusion that 'a middle ground must be established and this will involve ... genuine concessions of legal principle that will satisfy the essential interests of all concerned', D.P.O'Connell (1971), p. 76. See also the comments by Stevenson and Oxman on the single negotiating text, J.R.Stevenson & B.H.Oxman (1975), p. 784.

[149] See, for example, the statement of the Indonesian delegate, who stated that his delegation was prepared to consider a proposal regarding a mathematical formula fixing the maximum permissible length of baselines and the ratio between land and water within those baselines, provided that it met the requirements of Indonesia and the other archipelagic states, UNCLOS II Off.Rec., Vol. III, 42nd Meeting, para. 61-67. Eleven archipelagic states participated in the Conference - most of which at a later stage, as they attained their independence during the negotiations of UNCLOS III; the archipelagic states participating in the Conference were: Fiji, Indonesia, Philippines, Mauritius, Maldives, Bahamas, Trinidad and Tobago, Samoa, Papua New Guinea (since 1975), St Vincent and the Grenadines (since 1979), Solomon Islands (since 1978), Tuvalu (since 1978) and Vanuatu (since 1980).

[150] E.D.Brown (1994), p. 108.

[151] See E.Miles, 'An interpretation of the Geneva Proceedings, Art. II', (3) *ODIL* (1976), p. 307 where the author noted that the compromise was reached in behind-the-scene negotiations between the archipelagic and advanced maritime states in which the Chairman of Committee II, Anderes Aguilar, played an important mediatory role.

regarding mainly the question of straits.[152] The Soviet representative during UNCLOS stated that the question of the regime of archipelagic waters should be considered together with other related questions as a package deal and he went on to mention the issue of free transit passage along the shortest routes through archipelagic straits and waters traditionally used for international navigation.[153]

Lastly, the procedural rule of the decision-making by consensus adopted by the Conference[154] as a means of reconciling differences without the pressure of voting influenced also the negotiations regarding the question of archipelagos.[155] The Greek delegate stated, for example, at the 168th Meeting that, for the purpose of facilitating consensus, his delegation decided to withdraw its amendment regarding the extension of the application of the archipelagic regime to archipelagos forming part of a continental state.[156] Since there was, indeed, a consensus among states[157] regarding the application of an archipelagic regime on archipelagic state, while the opinions on the status of midocean dependent archipelagos were diverse, the Conference abandoned the issue of dependent archipelagos and adopted the regime, which had already attained consensus among the participating states.[158]

During the last sessions of the Conference, states in possession of an archipelago pressed – though without success - for the inclusion of a provision for a protective regime such as the one envisaged for archipelagic states for mid-ocean dependent

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[152] Relevant to the question of archipelagos was for example the discussions of the Private Working Group on Straits used for International Navigation and the Informal Consultative Group on Straits; *UN Office for Ocean Affairs and the Law of the Sea, Archipelagic States: Legislative History of Part IV of the UN Convention on the law of the Sea*, p. 71.

[153] UNCLOS III Off.Rec., Vol. II, 37th Meeting, para. 11, p. 267.

[154] See the Gentlemen's agreement regarding the Rules of Procedure on decision-making: 'The Conference should make every effort to reach agreement on substantive matters by way of consensus and there should be no voting on such matters until all efforts at consensus have been exhausted', UNDoc.A/CONF.62/30/Rev.2.

[155] N.Barron, 'Archipelagos and archipelagic states under UNCLOS III: No Special Treatment for Hawaii', 4 *Hastings International and Comparative Law Review* (1980-1), p. 512.

[156] UNCLOS III Off.Rec., Vol. XVI, 168th Meeting, para. 39, p. 90.

[157] P.Vignes defines consensus as following: 'consensus does not imply unanimity but a very considerable convergence of opinions and the absence of any delegations in strong disagreement, however few in number', P.Vignes, 'Will the Third Conference on the Law of the Sea work according to consensus rules', 69 *AJIL* (1975), p. 124. See also B.Buzan, 'Negotiating by consensus: development in technique at the UNCLOS', 75 *AJIL* (1981), pp. 324-348.

[158] At the sixth session in New York in 1977, the revised single negotiating text was replaced by the informal composite negotiating text with few changes with regard to the issue of archipelagic states (UNCLOS III Off.Rec., Vol. VIII, Document A/CONF.62/WP.10); the issue of archipelagos belonging to continental states was not included either in the composite negotiating text. After the sixth session the issue of archipelagos did not appear among the core issues of the Conference for which negotiations groups were set up (*Legislative History of Part IV of the UN Convention on the Law of the Sea: Archipelagic states*, p. 96); this gives the impression that a consensus was reached with regard to the provisions on archipelagic states

archipelagos.[159] A written informal suggestion was also submitted by Ecuador regarding the adoption of a new article relating to the application of the system of baselines drawn in accordance with article 47 (on archipelagic states) to archipelagos forming part of the territory of a state.[160] This informal suggestion was supported by France[161] and Greece.[162] Ecuador, however, realising the reluctance of the participants to accept such provision, tried to differentiate its case by stressing the need for the adoption of a protective regime for the Galapagos archipelago.[163]

Greece also submitted an amending proposal on this issue, which was, however, withdrawn in the plenary meeting in April 1982.[164] During the final part of the eleventh session in December 1982 India[165], Spain[166] and Ecuador[167] referred to what they have called unfairness to archipelagos forming part of a coastal state by their exclusion from the regime applied to archipelagic states.

(b) Conditions for the application of the archipelagic regime: archipelagic definition vs. quantitative requirements

The dispute regarding the conditions for the application of archipelagic baselines was adumbrated in the proposals submitted by states in the Sea-Bed Committee. While the UK in her draft articles set technical conditions regarding the application of the straight baselines system providing for a maximum length of 48 nautical miles for the

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[159] Specifically, at the seventh session of the Conference, Greece (UNCLOS III Off.Rec., Vol. IX, 103rd Meeting, para. 48, p. 65) and Spain (*Ibid,* 104th Meeting, para. 40, p. 72) commented on the informal composite negotiating text noting that the text should also include a provision regarding archipelagos belonging to continental states. At the eleventh session of the Conference, the delegations of Ecuador, India and Portugal made statements in the plenary expressing their view that archipelagos forming part of a continental state should also be entitled of a special regime as the one attributed to archipelagic states; *Ibid*, Vol. XVI, 161st Meeting, para. 120, p. 40; *ibid*, 162nd Meeting, para. 27, p. 45; *ibid*, 165th Meeting, para. 37, p. 73.

[160] R. Platzöder (1982), p. 55 and 77.

[161] *Ibid*, Vol. XIII, 127th Meeting, para. 72, p. 30.

[162] *Ibid*, Vol. XIV, 136th Meeting, para. 110, p. 38.

[163] *Ibid,* Vol. XIII, 126th Meeting, para. 115, p. 19.

[164] The draft article proposed by Greece read as following: 'The territorial sea, the EEZ and the continental shelf of a group of islands part of the territory of a state which constitute an archipelago as defined in article 46 (b) shall be determined through the system of baselines drawn in accordance with article 47', *ibid*, Documents of the Conference, Doc. A/CONF.62/L.123, p. 232; this proposal was subsequently withdrawn: *ibid*, 168th Meeting, para. 39, p. 90.

[165] *Ibid*, Vol. XVII, 187th Meeting, para. 8.

[166] *Ibid*, 190th Meeting, para. 100.

[167] *Ibid*, para. 196.

straight baselines and a maximum water-to-land ratio of 5:1,[168] the archipelagic states would not admit any such conditions.[169]

Archipelagic states were reluctant to accept technical, quantitative requirements regarding the length of the baselines or the water-to-land ratio and argued that the legal definition of archipelagos as reflected in their draft was adequate to address concerns stemming from a potential abuse of the application of the archipelagic system.[170] On the contrary, the group of maritime powers resented the vague definition suggested by archipelagic states and were determined to set clear criteria for the application of straight baselines.[171] This conflict led to a mutual compromise. In particular, archipelagic states consented to the stipulation of quantitative criteria alongside their more general, vague archipelagic definition whereas maritime powers accepted more generous mathematical requirements for the application of archipelagic baselines. On the basis of this compromise, the LOSC finally included both provisions.[172] The legal definition of an archipelago contained in article 46 (b) of the LOSC was transferred almost *verbatim* from the draft articles submitted by the archipelagic states in the Sea-Bed Committee.[173]

In particular, according to this article 'archipelago means a group of islands, including parts of islands, interconnecting waters and other natural features[174] which are so closely inter-related that such islands, waters and other natural features form an intrinsic geographical, economic and political entity or which historically have been regarded as such'.[175]

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[168] *Ibid,* Chap. 33 (originally issued as A/AC.138/SC.II/L.44), p. 99-100.

[169] The draft proposal submitted by archipelagic states in the Sea-Bed Committee entailed the following definition of an archipelago: 'For the purposes of these articles an archipelago is a group of islands and other natural features which are so closely interrelated that the component islands and other natural features form an intrinsic geographical, economic and political entity or which historically have been regarded as such'; GA Off.Rec., Twenty-eighth Session, Supplement No. 21(A/9021), Vol. III, Annex II, Appendix V, Chap. 38 (originally issued as A/AC.138/SC.II/L.48), p. 102-5

[170] See the statement of the Indonesian delegate; UNCLOS III Off.Rec., Vol. II, 36th Meeting, p. 260, para. 4 and the statement of the Fijian delegate, ibid, p. 262-3.

[171] See the statement of the Japanese delegate: ibid, 36th Meeting, p. 261, para.15.

[172] Brown contends that because of this compromise articles 46 and 47 'are drafted in a confusing and confused manner'; E.D.Brown (1994), p. 109.

[173] See *supra* note 112.

[174] The phrase 'parts of islands' was included to refer to the geographic realities of some archipelagic states, particularly Indonesia which shares Borneo with Malaysia and Papua New Guinea which shares New Guinea with Indonesia. Article 47 on archipelagic baselines refers to some of the 'other natural features', for example, drying reefs (para.1), LTE (para.4) and lastly fringing reefs and atolls (para.7).

[175] This definition first appeared in the Draft articles submitted by Indonesia, Philippines, Fiji and Mauritius in the Sea-Bed Committee; see *supra* p. 43, note 113.

This definition reflects the attempts made by archipelagic states to dissociate their case from previous archipelagic proposals by stressing various non-geographical factors, such as economic, political, historical, which differentiated their archipelagos from solely geographically defined groups of islands. The key notion of the legal aspect of the archipelago is unity. According to the above provision a group of islands should be so closely inter-related as to form an intrinsic geographical, economic and political unity. [176] Alternatively and in the case that the archipelago did not satisfy the unity requirements, it could still qualify as an archipelago as long as it has been historically regarded as such.

The geographic unity refers to the adjacency, the actual relationship between the natural features of the archipelago.[177] The mere existence of several islands in the ocean would not necessarily make them an archipelago.[178] There should be a close interconnection between the waters and the land so as to justify special treatment of this geographic feature.[179] The economic unity of the archipelago is indicated by the close interrelationship between the islands and the resources of the interconnecting waters. [180] Political unity presupposes primarily that the islands of the archipelago belong to the same state.[181] It does not presuppose, however, that the archipelago should be a single state.[182] It can be either an archipelagic state or an archipelago belonging to a continental state.[183] Lastly, the historical criterion for the identification of the legal archipelago is provided as an alternative in case an archipelago cannot meet the three previous requirements.[184] Examining the way historical implications were contemplated by the ICJ in the *Fisheries case*, it seems that the state claiming that a group of islands forms an archipelago for historical reasons must provide

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[176] See the analysis in L.L.Herman (1985), p. 179.
[177] O'Connell calls this 'the centripetal emphasis' of the group of islands; D.P.O'Connell (1971), p. 15.
[178] C.F.Amerasinghe (1974), p. 564.
[179] See also *Fisheries case,* p. 133, where the Court stressed the dependency of the sea upon the land domain.
[180] C.F.Amerasinghe (1974), p. 565. Jayawardene contends, though, that the economic criterion is subjective in character as almost any archipelagic entity may point to economic reasons for unity. H.W.Jayawardene (1991), p. 139.
[181] C.F.Amerasinghe (1974), p. 557.
[182] M.Munavvar (1995), p. 114. Rodgers states, on the contrary, that 'no reference to 'mixed states' is contained in this definition, P.E.J.Rodgers (1981), p. 183.
[183] H.W. Jayawardene (1990), p. 139.
[184] C.F.Amerasinghe (1974), p. 566. D.W.Bowett (1976), p. 106.

evidence that the consideration of the archipelago as a compact whole has been consolidated by constant and sufficiently long practice.[185]

The apparent vagueness of the legal definition of an archipelago is counterbalanced by the prescription of quantitative conditions for the actual application of archipelagic baselines.[186] In particular, the drawing of archipelagic baselines is subject to a number of conditions stipulated in article 47, two of which are precise and mathematical and the rest more general and less precise.[187] As mentioned above, maritime powers appeared concessionary and consented to more generous figures than those originally suggested.[188] The quantitative conditions adopted, particularly regarding the length of the archipelagic baselines (up to 100 n.m. with an exception of up to 3 per cent of the total number of baselines not exceeding, though, 125 n.m.) and the water-to-land ratio (1:1 up to 9:1),[189] may be regarded as very generous and, thus, a success for the archipelagic states participating in the LOSC, which ensured that they would be able to apply archipelagic baselines encircling the entirety of their archipelagos.

(ii) The archipelagic regime: a regime to satisfy conflicting interests

The regime applicable to the waters enclosed by archipelagic baselines and the rights exercised by third states therein was the most controversial issue in the discussions concerning the archipelagic problem during UNCLOS III. Archipelagic states were forced to make concessions to their earlier claims with regard to the status

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[185] *Fisheries case, ICJ Rep. 1951*, p. 133. See also the statement of the Counsel for Norway quoted by the Court: 'The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny; it invokes history together with other factors, to justify the way in which it applied the general law', p. 133; see also the ruling of the ICJ with regard to the Lopphavet basin, p. 142.

[186] D.W.Bowett (1976), p. 84.

[187] R.R.Churchill & A.V.Lowe (1999), p. 123.

[188] In the draft articles submitted to the Sea-Bed Committee by the UK it was suggested that no baseline would be longer than 48 n.m. and that the water-to-land ratio would not exceed five-to-one; *supra* note 113. The negotiations for the adjustment of these numbers on the basis of mutual concessions were mainly conducted in informal working groups.

[189] The minimum of the 1:1 water-to-land ratio was imposed in order to exclude states composed of one large island surrounded by small insular dependencies, such as Australia, UK, New Zealand, Iceland, Madagascar from applying the archipelagic regime; H.W.Jayawardene (1990), p. 146; R.R.Churchill and A.V.Lowe (1999) doubt the necessity of such provision, p. 123. Kwiatkowska and Agoes argue that 'an adjustment to the Convention's rules would seem to be easier for widely scattered island states having a water to land ratio exceeding the permissible maximum of 9:1, than for states wit a ratio below the minimum of 1:1' pointing out that in the first case the archipelagic state may choose to unite smaller groups of islands within the archipelago or adjusting its archipelagic baselines in such a way as to succeed in attaining the permissible water-to-land ratio. B.Kwiatkowska & E.R.Agoes, *Archipelagic Waters Regime in the light of the 1982 UNCLOS and State Practice* (Bandung: ICLOS, UNPAD, 1991), p. 38.

of the enclosed waters and particularly with regard to the rights exercised therein by vessels and aircrafts of third states. Moreover, this regime was the result of negotiations carried out between archipelagic states and maritime powers. Other states, for example states possessing archipelagos, were not invited in these negotiations, nor did they have any influence upon the drafting of the provisions on archipelagic waters. Therefore, the archipelagic regime of the LOSC satisfied conflicting interests by taking into consideration the geographic realities and needs of the archipelagic states participating in the LOSC and the navigational interests of the major maritime powers.

The archipelagic regime of the LOSC has been criticised as being in such a degree concessionary to the interests of maritime powers that the main aspirations of archipelagic states were not ultimately attained.[190] However, archipelagic states tried to downgrade the concessions made and to advance the importance of the recognition of a special status for their archipelagos and particularly the importance of the exercise of sovereignty over these waters. Today, 20 states[191] have enacted legislation establishing archipelagic baselines in their archipelagos and have applied the archipelagic regime of the LOSC.[192]

The concept of archipelagic waters, that is the waters enclosed by archipelagic baselines, is a new one in international law.[193] Archipelagic waters are neither internal waters nor territorial sea; in fact, they have a *sui generis* legal status, encompassing elements from both of the previously mentioned maritime zones.[194] The concept of archipelagic waters emerged as a compromise during UNCLOS III reconciling the differences between archipelagic states, which advocated in favour of the characterisation of these waters as internal waters, and maritime states, which desired to preserve navigational rights through these waters. Archipelagic states were satisfied by the recognition of their absolute sovereignty over the enclosed waters and the air

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[190] A.Dale (1978), p. 63; R.Lattion (1984), p. 199-200.

[191] The states which have claimed archipelagic status are the following: Antigua & Barbados, Bahamas, Cape Verde, Comoros, Fiji, Indonesia, Jamaica, Kiribati, Maldives, Marshall Islands, Papua New Guinea, Philippines, St Vincent & Grenadines, Sao Tome & Principe, Seychelles, Solomon Island, Trinidad, Tuvalu, Vanuatu and Dominican Republic. Bahamas, Comoros, Kiribati, Marshall Islands and Seychelles have not defined their archipelagic baselines.

[192] See however, the implications regarding the establishment of archipelagic sea lanes; *infra* note 210. The Philippines have not changed their legislation enacted before the adoption of the LOSC and still consider the enclosed waters as internal waters of the state; see Republic Act No. 3046 of June 1961; on the practice of the Philippines see B.Kwiatkowska (1991), p. 10 *et seq.*

[193] R.R.Churchill & A.V.Lowe (1999), p. 125.

[194] See M.Munavvar (1995), p. 155. Munavvar points out also that this new term was preferred in order to avoid the difficulties in applying traditional concepts to archipelagic situations. See also E.D.Brown (1994), p. 114. B.Kwiatkowska & E.R.Agoes (1991), p. 40.

space over them[195] and ensured that any rights recognised in favour of third states in these waters will not affect in any way the legal status of the archipelagic waters as an integral part of the archipelagic state's territory.[196]

The first category of rights recognised in favour of third states refers to various rights enjoyed traditionally by third - mostly neighbouring - states within the archipelagic waters. Under the pressure of Malaysia and Thailand,[197] which had an interest in the archipelagic waters adjacent to their maritime zones, the LOSC recognised and provided for 'traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring States in certain areas falling within archipelagic waters'[198] regulated by bilateral agreements between the states concerned[199] as well as for the respect of 'existing submarine cables laid by other states and passing through its waters'.[200]

With regard to navigational rights, the initial concessions archipelagic states were willing to make in order to assuage the concerns of other states referred to the recognition of the right of innocent passage in the waters enclosed by archipelagic

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[195] Article 49 (1-2) of the LOSC.

[196] Article 49 (4) of the LOSC. Tolentino points out that the archipelagic state is free to adopt any measures in the sea lanes regarding its protection as long as it does not impair the right of archipelagic sea lanes passage or overflight to vessels and aircrafts of foreign states, A.Tolentino, 'Archipelagos under the Convention on the Law of the sea' 28 *Far Eastern Law Review* (1984), p. 8. The sovereignty of the archipelagic state over its archipelagic waters is also recognised in article 2 (1) which reads as following: 'The sovereignty of a coastal state extends beyond its land territory and internal waters and in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea described as the territorial sea'.

[197] During UNCLOS III, Malaysia and Thailand as states closely neighbouring archipelagic states, while accepting in principle the archipelagic concept pressed for the recognition of rights of neighbouring states in archipelagic waters particularly for those traditionally exercised therein (UNCLOS III Off.Rec., Vol. II, 42nd Meeting, p.293, para 4-14 (Malaysia); A/CONF.62/L.2/L.64 (Thailand)); The provisions referring to the protection of these rights were drafted to assuage mostly the concerns raised by these two states

[198] Article 51 (1) of the LOSC. Para. 6 of article 47 also provides for the rights of neighbouring states as following: 'If a part of the archipelagic waters of an archipelagic state lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the later State has traditionally exercised in such waters and all rights stipulated by agreement between those States shall continue and be respected'. See B.A.Hamzah, 'Indonesia's archipelagic regime: Implications for Malaysia', 8 *MP* (1984), p. 30 *et seq.*

[199] For example, Malaysia has signed, according to article 51, a bilateral agreement with Indonesia covering a wide spectrum of interests and rights: Jakarta Treaty, 25 February 1982 The text of the treaty may be found at UN Office for Ocean Affairs and the Law of the Sea, *The Law of the Sea: Practice of Archipelagic States* (N.York: UN Publ., 1992), p. 144-155

[200] Article 51 (2) of the LOSC. Kwiatkowska and Agoes, point out that the non-navigational rights of third states in the archipelagic waters are of a 'non conflicting character' and 'affect the sovereignty of archipelagic states to a much lesser extent that navigational rights'; B.Kwiatkowska & E.R.Agoes (1991), p. 40-41.

baselines.[201] However, maritime states were interested in preserving the mobility of their military fleets – including the submerged passage of submarines and the overflight of aircrafts. The debate on the archipelagic regime was closely linked to the question of the regime of straits, in the negotiations of which some of the archipelagic states were involved;[202] maritime states adopted a uniform stand pressing for the adoption of transit passage for all straits, including archipelagic.[203] Archipelagic states, on the other hand, counter-proposed as a compromise the restriction of the passage of vessels with special characteristics from specially designated sea-lanes.[204]

In this respect, the navigational rights attributed to third states were divided into two categories: firstly, by virtue of article 52 of the Convention vessels of third states enjoy the right of innocent passage within the archipelagic waters under the conditions stipulated in the relevant part of the Convention regarding innocent passage in the territorial sea.[205] Archipelagic states retained the right to suspend temporarily and after due publication the innocent passage of foreign ships in specified areas of the archipelagic waters if such suspension was found essential for the protection of their security.[206]

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[201] In their drafts, however, submitted to the Sea Bed Committed they suggested that the archipelagic states would designate sea lanes suitable for the exercise of the rights of innocent passage by third states; Draft articles on archipelagos submitted by Fiji, Indonesia, Mauritius and the Philippines to the Sea Bed Committee, *supra* note 112.

[202] See for example, the draft proposals submitted by Fiji with regard to the regime of straits of international navigation; Doc.A/AC.138/SC.II/L.42 (19 July 1973) see also the statement of the Indonesian delegate: Doc. A/AC.138.SC.II/SR.11 (6 August 1971); see A.Dale (1978), p. 55-57.

[203] See *supra* note 130 the statements of the Soviet delegate and proposed draft A/CONF.62/C.2/L.52.

[204] See UNCLOS III Off.Rec., Vol. II, p. 261(Fiji), p. 188 (Indonesia). This proposal coincided with the proposal of strait states; see A.Dale (1974), p. 56.

[205] See Part II section 3 of the LOSC, especially article 18 and 19 regarding the exact meaning of innocent passage and the duties of third states' vessels exercising this right. Note that there is a debate with regard to the recognition of the right of innocent passage for warships within the territorial sea and subsequently within archipelagic waters. Various states require either prior authorisations or notification for foreign vessels intending to exercise their rights of innocent passage through their territorial sea or archipelagic waters; see for example the declarations upon ratification by Iran, Egypt, Yugoslavia, Sao Tome and Principe, Yemen, Romania found at http://www.un.org/Depts/los/convention_agreements/convention_ declarations.htm. Maritime powers such as the USA, Japan etc resist such practice and consider it incompatible with the LOSC. For an account of the evolution of the negotiations upon the right of innocent passage of warships and some references on state practice see F.Ngantcha, *The Right of Innocent Passage and the Evolution of the international Law of the Sea* (London: Pinter Publ., 1990), p. 122-152 and F.D.Froman, 'Uncharted Waters: Non-innocent passage of warships in the Territorial Sea', 21 *San Diego Law Review* (1983-4), pp. 625-689. See also B.Kwiatkowska & E.R.Agoes (1991), p. 41; see also E.D.Brown (1994), p. 65; R.R.Churchill & A.V. Lowe (1999), p. 89.

[206] Article 52 of the LOSC.

The resulting provision (article 53 of the LOSC) initiated a new concept in the law of the sea, that of the archipelagic sea-lanes passage.[207] Resembling the concept of transit passage through straits used for international navigation,[208] archipelagic sea lanes passage provides for an extensive right of navigation and overflight attributed to all vessels - including warships - and aircrafts of third countries and enjoyed by them solely in the sea lanes and the air routes specially designated by the archipelagic state in consultation with the 'competent international organisation', namely the IMO.[209] Paragraph 4 of the above article specifies the meaning of archipelagic sea lanes passage as following: 'archipelagic sea lanes passage means the exercise in accordance with this Convention of the rights of navigation and overflight in the normal mode solely for the purpose of continuous, expeditious and unobstructed transit between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone'.[210] Furthermore, by virtue of article 44 of the LOSC

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[207] The notion of archipelagic sea-lane passage appeared for the first time in the single negotiating paper prepared by the Chairmen of the three Committees at the third session of the Conference (Geneva, 17 March – 9 May 1975); UNCLOS III Off.Rec., Vol. IV, Doc.A/CONF.62/WP.8/PartII, p. 168-170.

[208] R.R.Churchill & A.V.Lowe (1999), p. 127. M.Munavvar (1995), p. 158. J.A.Roach & R.W.Smith (1996), p. 377. However, Kwaitakowska and Agoes specify particular legal differences between the two regimes stemming from the different terms used - particularly the term 'rights of navigations and overflight' used in defining archipelagic sealanes passage and the term 'freedom of navigations and overflight' used in defining transit passage of straits - and conclude that due to these differences the two regimes cannot be considered to coincide. B.Kwiatkowska & E.R.Agoes (1991), p. 46-52.

[209] Article 53 LOSC. Jayawardene observed that 'the concept of archipelagic sea-lanes passage has its origin in the practice of the archipelagic states, particularly Indonesia, in requiring foreign vessels to confine themselves to defined routes of navigation within the archipelagic baseline systems', (referring to the Indonesian Presidential Decree No. 8 of 1962 and Regulation No. 4 of 1960 relating to passage): H.W.Jayawardene (1991), p. 161. Brown points out that there is no obligation of foreign vessels to use the designated sea lanes as they can pass from any part of the archipelagic water exercising their right of innocent passage. E.D.Brown (1994), p. 121. With regard to the rights and duties of the foreign vessels and aircrafts and those of the archipelagic state, the LOSC cross-refers to the articles on transit passage through straits (article 54 of the LOSC). Of importance is paragraph 12 of article 53 which prescribes that if the archipelagic state does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation. There is though a debate of what constitutes 'routes normally used for international navigation'; see B.Kwiatkowska & E.R.Agoes (1991), p. 48.

[210] Article 53 LOSC. The International Maritime Organisation adopted resolution MSC.71 (69) (and a further amending Resolution MSC.165(78)) titled General Provisions on Ships' routeing regarding the adoption, designation and substitution of archipelagic sea-lanes. The following states' legislation provide for the establishment of archipelagic seas lanes but prescribe that till their designation the routes normally used for international navigation will be used: Antigua and Barbuda, Bahamas, Jamaica, Kiribati, Marshall Islands, Fiji, Solomon Islands, Vanuatu, Tuvalu, Seychelles, Saint Vincent and the Grenadines and Trinidad and Tobago. Cape Verde provides for the designation of archipelagic sea lanes without specifying that in the absence of such designation the routes normally used for international navigation will be used. The legislation of Comoros and Dominican Republic recognises only the right of innocent passage in the archipelagic waters. Lastly, the legislation of Maldives provides for the archipelagic sea lane passage without recognising any right of overflight. The only state which has designated sea-lanes within its archipelagic waters is Indonesia. After resolution MSC.72 (69) of the Maritime Safety Committee of the IMO regarding a partial system of archipelagic sea lanes for Indonesia, Indonesia enacted Regulation No. 37 dated 28 June 2002 on the Rights and Obligations of

regarding transit passage, which is applied *mutatis mutandis* in the case of archipelagic sea lanes passage, the archipelagic state cannot suspend the passage of vessels and aircrafts of third states in the designated sea lanes for any reason including the security of the state.[211]

Archipelagic sea lanes passage was a concession made by archipelagic states with a view to satisfying the demands of maritime powers regarding the passage of warships and submerged submarines[212] and overflight.[213] A further concession made by archipelagic states, which in a way limits their sovereignty, is article 53 (4) of the LOSC which prescribes that archipelagic sea lanes passage applies also to the adjacent territorial sea of the archipelagic states.

It should be borne in mind that the archipelagic regime was drafted in such a way as to balance the interests of archipelagic states and maritime states with regard to the geographic realities of the archipelagic states which participated in the LOSC. In particular, the archipelagic sea-lane passage was specifically drafted to satisfy the interests of maritime powers in the archipelagic straits of Indonesia and the Philippines, which are strategically located and through which important navigational routes cross.[214] Despite the compromissory nature of these provisions,[215] it is of

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Foreign Ships and Aircraft Exercising the Right of Archipelagic Sea Lanes Passage, which came into force on 28 December 2002; according to this regulation Indonesia has designated three archipelagic sea lanes within its archipelagic waters (see Appendix, Figure 3). It is mentioned by Kwaitkowska that in practice the Philippines – like Indonesia - allow 'foreign warships (submerged) and other ships to pass without notification or authorisation through the routes used customarily for international navigation within its waters'; B.Kwiatkowska (1991), p. 12.

[211] On the contrary, innocent passage within archipelagic waters may be suspended for reasons referring to the security of the state; article 52 (2) of the LOSC.

[212] B.Kwiatkowska & E.R.Agoes (1991), p. 43. The phrase 'in the normal mode' embodied in para. 3 of article 53 has been interpreted as allowing submarines – which must normally pass from the territorial sea on the surface - to pass submerged. M.Munavvar (1995), p. 168. A.Tolentino (1984), p. 6. E.D.Brown (1994), p. 120. Churchill and Lowe point out that at least this is the interpretation adopted by great maritime powers, which is consistent with the *travaux preparatoires* of UNCLOS III; R.R.Churchill & A.V.Lowe (1999), p.109. Roach & Smith referring to the term 'in the normal mode' point out that this concerns also military aircraft, which may overfly in combat formation and with normal equipment operating while surface warships may transit in formation steaming or launching and recovering aircrafts, J.A.Roach & R.W.Smith (1996), p. 37.

[213] It has been argued that the right of submarines to pass submerged through archipelagic sea lanes is one of the biggest concession made by archipelagic states at UNCLOS III; See C.S.N.Narokobi, 'The regime of Archipelagos in International Law', in J.M.Van Dyke, L.M.Alexander & J.R.Morgan (eds), *International Navigations: Rocks and Shoals Ahead? A Workshop of the Law of the Sea Institute, Honolulu, Hawaii, January 13-15, 1986* (Honolulu: The Law of the Sea Institute, 1988), p. 232.

[214] L.M.Alexander, *Navigational Restrictions within the New Law of the Sea Context: Geographical Implications for the US* (offshore Consultants Inc. Peace Dale, Rhode Island, December 1986), p. 290, 296-7, 362; B.Kwaitkowska (1991), p. 5-6, 14-5. The Philippines and Indonesia contain straits of critical importance for the US military and commercial fleets (referred to by Alexander as 'choke points', *ibid*, p. 354-6). See also L.Lucchini & M.Voelckel (1990), p. 368-9. According to the US State Department 13 passages exist within Indonesian territorial waters and 3 passages shared between Indonesia and a neighbouring state: 'Sovereignty of the sea', US State Department, Geographic Bulletin

importance that archipelagic states have attained this objective by drawing archipelagic baselines encircling their archipelagos and can exercise sovereignty – even subject to the restrictions of Part IV of the LOSC - over the archipelagic waters.

1.4 Concluding remarks: the archipelagic concept and the archipelagic regime of the LOSC: gains and losses

There has been an immense change in the archipelagic concept prior to and after the Third United Nations Conference on the Law of the Sea. Initially, the archipelagic concept was thought to concern groups of islands, which were in close proximity to each other, in most cases at a distance not exceeding 10 n.m.. The solution proposed according to this view envisaged the application of the straight baseline system already prescribed for coastal groups of islands and the internalisation or territorialisation of the enclosed waters. After the conclusion of the Conference, the archipelagic regime adopted in the LOSC, was restricted to archipelagic states, namely states constituted wholly by archipelagos and whose geographic configuration consisted of islands scattered in a vast maritime area. The content of the archipelagic regime was also prescribed to 'fit' the geographic particularities of archipelagic states and the needs and interests, particularly concerning navigation, of great maritime powers.

It should be noted that the archipelagic regime as prescribed in the LOSC is unsuitable for groups composed of islands lying in close proximity to each other. In this case and particularly in the case where the territorial seas generated from each island overlap, the archipelago would not benefit from the application of the archipelagic regime as the latter would impose an additional burden upon the sovereignty of the state, namely, archipelagic sea lanes passage. Whereas initial proposals both by archipelagic states and by states possessing archipelagos referred solely to the recognition of innocent passage in the waters enclosed by archipelagic

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No. 3; 'World straits affected by a 12-mile territorial sea' map prepared by the Office of the Geographer, Department of State, Washington DC. Dale pointed out the significance of the Indonesian navigation routes for states with important navies and stressed that maritime powers would be reluctant to accept any regime which would pose many restrictions upon their mobility; he particularly mentions that vessels would have to deviate 3,000 miles in order to avoid traversing the Indonesian archipelagic waters. Fiji and Bahamas also have important navigation routes within their waters; see A.Dale (1978), p. 51 and references therein.

[215] Wisnumurti pointed out that the security interests of the archipelagic states are not compromised by the archipelagic sea lanes regime as long as the safeguards provided for in the Convention are met; N.Wisnumurti, 'Archipelagic Waters and Archipelagic Sea Lanes' in J.M.Van Dyke, L.M.Alexander & J.R.Morgan (1988), p. 206.

baselines, the course of the negotiations revealed the reluctance of maritime powers to accept the archipelagic regime without maintaining more extensive passage rights. Archipelagic sea lanes passage was primarily designed to address concerns of passage through straits used for international navigation, specifically through the Indonesian and the Philippino archipelago, which were particularly important for the mobility of military navies and the air forces of maritime powers. This compromise may have been essential for the application of the archipelagic concept in cases of archipelagos scattered in a broad maritime space but seems inappropriate for groups, where the islands are located in close proximity to each other covering a small maritime area.[216] The implications of the inefficacy of the archipelagic regime will be surveyed in Chapter 3 and 4 when the practice of continental states in their outlying archipelagos will be discussed.

There was also some confusion in how the issue was treated by states possessing archipelagos during the negotiations. Realising that the archipelagic regime had been accepted in principle for archipelagic states, these states advocated the *mutatis mutandis* application of the regime prescribed for archipelagic states to archipelagos forming part of their territory. These states, however, failed to see the consequences of the application of the archipelagic regime – in the drafting of which they had no participation – to groups of islands covering a small maritime space and thus geographic particularities were disregarded in the proposals submitted or supported by these states.

Proposals preceding UNCLOS III are not devoid of merit. As we will see in Chapters 3 and 4, these proposals have influenced state practice creating an emerging trend concerning the application of straight baselines to groups of islands. The impact of the principles enunciated by the ICJ in the *Fisheries case* upon state practice and upon the evolution of international law concerning the treatment of archipelagos is also important.

What is more, the LOSC drew a political distinction between dependent archipelagos and archipelagic states, restricting the application of the archipelagic

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[216] The fact that the archipelagic regime was drafted to fit the cases of the archipelagic states most of which are large and scarcely dispersed archipelagos may be manifested by the provisions concerning the designation of sea-lanes; it is there provided that archipelagic sea-lanes may have a maximum breadth of 50 n.m. whereas vessels exercising the archipelagic sea-lane passage 'shall not navigate closer to the coasts than 10 per cent of the distance between the nearest points on islands bordering the sea lane' (article 53 (6) of the LOSC); such provision seems meaningless in small archipelagic formations where the distance between the islands is much less than 50 n.m..

regime as prescribed in Part IV of the LOSC to the latter. Brown contended that the failure of UNCLOS III to make special provision for such island grouping has significantly weakened the rights of continental states regarding their midocean archipelagos.[217] However, continental states possessing archipelagos did express their objection to the non-inclusion of a provision on dependent outlying archipelagos in the Convention and stressed that the legal status of these archipelagos has remained unsettled.[218]

What is more, the incapacity of a Conference to regulate a specific issue does not necessarily mean that this issue cannot exist or evolve in international law and be regulated by it. For example, during the previous codification Conferences on the Law of the Sea, no conclusion was reached and no provision was adopted for the measurement of the territorial sea of groups of islands.[219] The absence of an explicit provision and the general terms in which article 10 (2) of the TSC was phrased[220] – which has a similar wording to article 121 (2) of the LOSC – had been interpreted by some authors as allowing the drawing of straight baselines in groups of islands.[221]

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[217] E.D.Brown (1994), p. 124.

[218] See *supra* p. 47-48 on the statements and proposals by states possessing archipelagos; see particularly the statement of the Greek delegate who stressed that the question of archipelagos belonging to a continental state had not yet been settled in the informal composite negotiating text.: Official Records of the Third United Nations Conference on the Law of the Sea, Vol. IX, Summary Records of Meetings, Plenary Meetings, 103rd Meeting, para. 48, p. 65. Commentators have expressed similar views: Anand remarked that while the problem of archipelagic states has been more or less settled and that they have come to be accepted as one unit, the status of archipelagos forming part of a coastal state, such as the Galapagos belonging to Ecuador and Andaman and Nicobar Island Groups belonging to India, is unclear; R.P.Anand (1979), p. 255; Mani also regards that the question whether the archipelagic regime should apply to dependent outlying archipelagos has been left open; V.S.Mani (1980), p. 103.

[219] Fitzmaurice pointed out in 1959 that the Geneva Conference on the Law of the Sea resolved 'the question of groups of islands or archipelagos by *not* providing (emphasis in the original text) any special system for delimiting the territorial sea of such groups on any 'group basis''; G.Fitzmaurice, 'Some results of the Geneva Conference on the Law of the Sea', 8 *ICLQ* (1959), p. 88. See *infra* note 221, for the contrary opinions of some authors.

[220] Article 10 (2) of the TSC reads as following 'the territorial sea of an island is measured in accordance with the provisions of these articles'.

[221] See J.H.W.Verzijl, *International Law in Historical Perspective,* Vol. III (Leyden, A.W.Sijthoff, 1970), p. 71. Sorensen argued that even though the 1958 Convention did not contain any articles on midocean archipelagos, it remained an open question 'how the territorial sea shall be measured in the case of such archipelagos', M.Sorensen, 'The Territorial Sea of Archipelagos' in *Varia Juris Gentium, Liber Amicorum J.P.A.Francois* (Leyden: Sijthoff, 1959), p. 316. Shalowitz also admitted that the question could not be considered as settled; A.Shalowitz, *Shore and Sea Boundaries Vol. I* (Washington: Coast and Geodetic Survey, 1962-4), p. 227. Dahm acknowledged the prospective of the measuring of the territorial sea from the archipelago as a whole but stressed that this issue was at the point of writing (1958) controversial; G.Dahm, *Volkerrecht,* Vol. I (Stuttgart: W.Kohlhammer Verlag, 1958), p. 653; Colombos wrote in 1967 that 'the generally recognised rule appears to be that a group of islands forming part of an archipelago should be considered as a unit and the extent of the territorial waters measured from the centre of the archipelago (references omitted)', p. 120.

Therefore, as long as no 'genuine' consensus was reached during UNCLOS III regarding the status of archipelagos forming part of a continental state, the issue of the application of a special system for dependent outlying archipelagos should be considered as unsettled and the absence of a provision on dependent outlying archipelagos in the LOSC should not be interpreted as restricting the rights of continental states in applying a special system for their outlying archipelagos despite the fact that this system is not regulated by the LOSC. In the light of the failure of the Conference to address comprehensively the archipelagic problem, states have resorted to unilateral action applying straight baselines to their outlying archipelagos.[222]

The archipelagic regime of the LOSC 'expanded' and at the same time 'restricted' the archipelagic concept. On one hand, it offers archipelagic states the possibility to join in a uniform regime the vast maritime area which is covered by their archipelagos by allowing for generous lengths for the archipelagic baselines. On the other hand, the archipelagic regime was prescribed to apply solely to archipelagic states excluding thus dependent outlying archipelagos. Moreover, the sovereignty of the archipelagic state over archipelagic waters was compromised and more restrictions in terms of rights of third states were stipulated. The archipelagic concept gained in spatial application but was compromised in jurisdictional power. The implications of such outcome are discussed in the following chapters with a view to demonstrating the possibilities within and outside the framework of the LOSC for the application of a special system to dependent outlying archipelagos.

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[222] Jayawardene stated that in the absence of a provision within the LOSC and 'in view of the strong opposition to the extension of the concept, unilateral proclamations are likely to pre-empt the issue': H.W.Jayawardene (1990), p. 142. See also R.R.Churchill & A.V.Lowe (1999), p. 120-121. This practice will be examined in Chapters 3 and 4.

Chapter 2: The Law of the Sea Convention and dependent outlying archipelagos

2.1 INTRODUCTION

The archipelagic concept purports to satisfy the special needs and safeguard the interests of archipelagos.[1] In practice, this concept is reflected in the application of straight baselines joining the outermost points of an archipelago and the recognition of the sovereignty of the state over the enclosed waters. The archipelagic regime as prescribed in the LOSC despite its deficiencies has attained such objectives and has satisfied archipelagic needs and interests as expressed by archipelagic states during UNCLOS III.[2]

As analysed in the previous Chapter, the archipelagic regime as prescribed in Part IV of the LOSC only partially addresses the archipelagic problems as its application is restricted to archipelagic states and is thus inapplicable to dependent outlying archipelagos. This Chapter assesses whether there are any possibilities arising from other provisions of the LOSC on the basis of which the archipelagic objectives, as set out above, may be realised for dependent outlying archipelagos.

This Chapter explores two possibilities. The first is whether archipelagic needs and interests can be satisfied through the adoption of a multi-zone regime composed of the zones of coastal jurisdiction recognised by the LOSC (territorial sea, contiguous zone, EEZ, continental shelf). This question was initially addressed during UNCLOS III where it was suggested that the archipelagic regime would be redundant after the adoption of the Exclusive Economic Zone, in the sense that the latter would give states exclusive access to the natural resources of the water column in a distance of 200 n.m. from their coasts. The continental shelf around the islands extending to 200 n.m. (or more) from the coasts of each island would give states access to the natural resources of the sea-bed. The first part of the present Chapter attempts to show the inadequacy of a multi-functional zone for archipelagos by conducting a comparative analysis of the two regimes in terms of satisfaction of the archipelagic needs and interests.

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[1] See Introduction, p. 1-2 and Chapter 1, p. 36-37.
[2] See P.E.J.Rodgers (1981) p. 190-2.

The second possibility concerns the delimitation of the territorial sea. Straight baselines are the commonest means through which the archipelagic concept may be fulfilled, particularly concerning the unification of the waters of the archipelago and the consideration of the archipelago as a compact whole for delimitation purposes. In this respect, Section 2 of the LOSC referring to the Limits of the Territorial Sea will be investigated particularly with regard to the potential application of article 7 (concerning straight baselines in coasts deeply indented and cut into or fringed by islands) and article 10 (on bay closing lines). These articles will be analysed with the view to examining whether and under what conditions a system of straight baselines may be validly applied in the case of outlying archipelagos.

2.2 Dependent outlying archipelagos and satisfaction of archipelagic needs on the basis of a multi-zone regime

The enhancement of coastal jurisdiction through the adoption of various functional zones in the LOSC has given rise to arguments regarding the redundancy of the archipelagic concept in the sense that archipelagic needs are satisfied and archipelagic interests are safeguarded through the jurisdictions attributed to the coastal state in the maritime zones generated from each island.[3] The arguments focus primarily on the EEZ, the adoption of which would satisfy archipelagos, in the sense that they will be given exclusive access to the exploitation of the marine natural resources in their waters.[4] In particular, Hodgson and Smith stressed that the archipelagic states or states possessing archipelagos would have no real practical gain – but maybe solely a psychological one - from the characterisation of the waters

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[3] See also Reisman and Westerman who criticise the notion of straight baselines as unjustifiable on the basis of the adoption of various zones legitimising a seaward expansion of the jurisdiction of coastal states, M.W.Reisman & G.S.Westerman (1992), p. 191 *et seq.*; for a reply to this criticism see Conclusions, p. 305-308.

[4] In the Report of the 28th Session of the Sea Bed Committee it is characteristically mentioned: 'Nevertheless, some reservations were raised regarding a special regime for archipelagos on the grounds that this regime was 'unnecessary in that the interests of archipelagic states would be fully covered by the concept of the EEZ or by that of national ocean space'. GA Off.Rec. 28th Session, Suppl. No 21 (A/9021), Vol. I, Annex II, Para. 80, p. 55-6. For the expression of such views during UNCLOS III see J.R.Stevenson & B.H.Oxman (1975), p. 21; B.H.Oxman, 'The Third UNCLOS: The 1977 New York Session', 72 *AJIL* (1978), p. 65.

enclosed by archipelagic baselines as archipelagic as compared with their recognition as EEZ waters.[5]

However, it should be noted that these observations only concern the application of the archipelagic regime as prescribed in Part IV of the LOSC and not the archipelagic concept in general. A regime providing for the internalisation or territorialisation of the waters enclosed by straight baselines, which could be considered as a more appropriate reflection of the archipelagic concept,[6] is certainly more advantageous for states than any multi-zone regime. In the territorial sea, the sovereignty of the state is only subject to the right of innocent passage; no other right may be exercised by third states in this maritime zone.

In this respect, this subsection examines whether a multi-zone regime consisting of the various maritime zones of coastal jurisdiction prescribed in the LOSC, may be deemed as satisfying the archipelagic claims in terms of needs and interests and offer a practical substitute of the archipelagic regime. Particular reference will be made to the function of the EEZ, as it is likely that the EEZs generated from each island of the archipelago will overlap creating a common maritime zone between the islands, where the state possessing the archipelago will benefit from the exploitation of the natural resources.[7] It should be noted that the archipelagic regime as prescribed in the LOSC, despite its being criticised as falling short of the aspirations of archipelagic states, which envisaged lesser limitations upon their sovereignty, has been considered as satisfying most of the archipelagic needs and concerns.

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[5] R.D.Hodgson & R.W.Smith (1976), p. 244. See also D.P.O'Connell (1982-1984), p. 254. It should be noted that these comments put in question the archipelagic concept for all types of archipelagos, both those belonging to a continental state and those composing an independent state. However, since archipelagic states are enjoying the benefits from the archipelagic regime as attributed to them by the LOSC, the examination of the validity of these arguments in the framework of this study will refer to the case of dependent outlying archipelagos.

[6] The potential emergence of such a regime is examined in Chapter 4.

[7] With regard to islands, article 121 (1) recognises explicitly the capacity of islands with the exception of article 121 (3) regarding rocks which cannot sustain human habitation or have economic life of their own, to generate apart from other maritime zones, an Exclusive Economic Zone. Therefore, all states may adopt an EEZ around each of their islands in a breadth of 200 nautical miles from the baselines established for the territorial sea. Nowadays, most states possessing midocean archipelagos have adopted an EEZ for their insular territories. For example, France has adopted an EEZ for all her archipelagic dependencies like French Polynesia, New Caledonia, Kerguelen Islands, Guadeloupe and Martinique and so have done other states such as New Zealand (for the Cook Islands), Portugal (for Azores and Madeira Islands), the USA (for the state of Hawaii, the Northern Mariana Islands, American Samoa).

The reasons in support of the archipelagic regime, as advocated by the participants in UNCLOS III were presented in Chapter 1.[8] In particular, archipelagic claimants stressed the importance of economic and social considerations referring to the exploitation of the natural resources of the waters of the archipelago and the dependence of the local population upon the sea in terms of economic activities. Of equal importance were political concerns referring to the internal and external security of the archipelago. The environmental aspect concerning the protection of the waters of the archipelago from pollution and from degradation of the marine environment was also of major concern to archipelagic states and archipelagos forming part of a continental state.

2.2.1 Legal nature of the maritime zones and jurisdictions attributed to the coastal state: do they satisfy archipelagic needs and interests?

A multi-zone regime is based on the idea that problems related to specific issues such as fishing, customs, pollution etc may be resolved through the adoption of different functional zones, in each of which the coastal state has different jurisdictional competences.[9] Before examining the particular jurisdictions attributed to the coastal state in the maritime zones and the correlative needs and interests they intend to safeguard, a major inadequacy of the multi-maritime-zone regime should be mentioned.

This inadequacy refers to the legal nature of the waters of the archipelago in which the archipelagic regime is applied in contrast to the legal nature of those in which no special regime is envisaged. Apart from the territorial sea, the various zones recognised in the LOSC are of a functional nature attributing specific jurisdictions to the coastal states but not sovereignty. In particular, the EEZ is a resource-based (or resource-oriented) multifunctional zone[10] where the coastal state enjoys sovereign

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[8] See Chapter 1, p. 36-37 for an analysis of these reasons; see also M.Munavvar (1995), p. 27-37

[9] See M.S.McDougal & W.T.Burke (1962), p. 419: 'The important question for policy is whether any or all of these factors establish a need for comprehensive coastal authority over the adjoining ocean, as these states (midocean archipelagic states) sometimes suggest, or whether more limited specially designed zones of authority might adequately protect exclusive interests'.

[10] B.Kwiatkowska, *The 200 mile EEZ in the New Law of the Sea* (Dordrecht: Martinus Nijhoff Publ., 1989), p. 4. F.Orrego Vicuna, *The Exclusive Economic Zone: Regime and legal nature under international law* (Cambridge: Cambridge University Press, 1989), p. 24, 41-8. W.C.Extavour, *The Exclusive Economic Zone: A Study of the Evolution and Progressive Development of the International Law of the Sea* (Geneva: Institut Universitaire de Hautes Etudes Internationales, 1979), p. 176-7.

rights and related jurisdiction as provided for in article 56 of the Convention and where third states enjoy specific rights and freedoms.[11]

The notion of sovereign rights is different from the notion of sovereignty. Sovereign rights are not rights deriving from sovereignty but rights of specific functional purpose.[12] Therefore, while the archipelagic state exercises sovereignty,[13] namely exercises all the competences and powers attributed to states over their territory, in the case of the EEZ, the coastal state enjoys rights and jurisdiction of a functional nature specifically attributed to it by the Convention.[14]

Furthermore, these sovereign rights and the jurisdiction exercised by the coastal state in its EEZ are not absolute. Due to its functional nature the EEZ is characterised by a balance between the rights of the coastal state and the freedoms enjoyed by third states[15] and by an inherent limitation of the sovereign rights exercised by the coastal state. [16] This balancing of rights and the vague provisions of the LOSC have given rise to disputes with regard the extent of the rights of coastal and third states.[17]

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[11] See article 56 (1) (a) for the sovereign rights enjoyed by the coastal state in its EEZ and article 56 (1) (b) on the jurisdictions entrusted to the coastal state. The notion of jurisdiction is more limited in comparison to the sovereign rights enjoyed by the state.

[12] Extavour states that sovereign 'rights and jurisdiction do not flow from the sovereignty of the coastal state (and so cannot be properly referred to as sovereign rights) but rather are justified by the exclusive character of its jurisdiction in the zone over certain specified kinds of activity'; W.C.Extavour (1979), p. 188. E.D.Brown (1994), p. 220; K.Ioannou &A.Strati, *The Law of the Sea* (2nd ed.) (Athens, Komotini: A.N.Sakoulas Publ., 2000), p. 176-7 &194. Nadelson points out that 'the LOS Convention's limits do not simply demarcate the line between different zones; they distinguish between sovereignty where the state generally holds primacy and sovereign rights where only the claim to certain circumscribed rights comes first'; R.Nadelson, 'The Exclusive Economic Zone: State Claims and the LOS Convention', 16 *Marine Policy* (1992), p. 472.

[13] Article 49 of the LOSC which prescribes that 'the sovereignty of the archipelagic state extends to the waters enclosed by the archipelagic baselines drawn in accordance with article 47 ..'.

[14] E.D.Brown (1994), p. 220. Attard observes that 'article 89 which prohibits claims of sovereignty over the high seas is made applicable to the EEZ through article 58 (2)'; D.J.Attard, *The Exclusive Economic Zone in International Law* (Oxford, Clarendon Press, 1987), p. 47. The rights enjoyed by the coastal state in the EEZ have been described as 'economic sovereignty' ('souveraineté économique') by Dupuy or as 'functional sovereignty' by Lupinacci who points out that the 'principle of sovereignty and the principle of freedom are both valid with the same maritime space, their respective applications being distributed in relation to different purposes'; see respectively R-J.Dupuy, 'La mer sous compétence national' in R-J.Dupuy & D.Vignes, *Traité du Nouveau Droit de la Mer* (Bruxelles : Bruylant, 1985), p. 255 and J.C.Lupinacci, 'The Legal Status of the EEZ in the 1982 Law of the Sea Convention' in F.Orrego Vicuna, *The EEZ: A Latin American Perspective* (Boulder, Colorado: Westview Press, 1984), p. 112-3. See the comment made by the Canadian delegate during UNCLOS: '... the concept of the economic zone was an assertion of a number of types of jurisdiction which together fell short of sovereignty'; UNCLOS III Off.Rec., 37th Meeting, para. 63.

[15] B.Kwiatkowska (1989), p. 5.

[16] Article 56 (2) of the LOSC reads as following 'In exercising its rights and performing its duties under this Convention in the exclusive economic zone, the coastal state shall have due regard to the

It is true that the sovereignty enjoyed by archipelagic states in their archipelagic waters is subject to the provisions of the LOSC regarding the rights of third states exercised in these waters.[18] However, despite the specific limitations referring to third states' rights in the archipelagic waters, which are more restricted than the rights third states enjoy in the EEZ, the notion of sovereignty 'equalizes' the archipelagic waters with the territory of the archipelagic state. This is the basic attribute of the archipelagic concept: the recognition of the interaction and interdependence of the waters and the land on an equal basis.

A. Economic aspects – Natural Resources

Both the continental shelf and the EEZ extending to a breadth of 200 n.m. (or more in the case of the continental shelf[19]) from each island of the archipelago give coastal states sovereign rights for the purpose of exploring and exploiting the natural resources of the seabed and the waters between the islands respectively.[20] It would seem, therefore, that the overlapping continental shelves and EEZs generated by each island of the archipelago would form a compact zone in the intervening waters, where the state in whose possession the archipelago lies would be able to exploit and preserve the natural resources. This possibility seems to satisfy the economic needs of an archipelago.

However, there are some limitations to this. The first limitation concerns the existence of rocks within the archipelagic formation. According to article 46 (b) an archipelago is 'a group of islands, including parts of islands, interconnecting waters and other natural features which are closely inter-related ...'. This means that an

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rights and duties of other states and shall act in a manner compatible with the provisions of this Convention'.

[17] For example the complex fishing regime of the EEZ has led to disputes with regard to the exploitation of the fishing resources particularly straddling stocks and highly migratory species; see for example the dispute between the USA and member States of the South Pacific Forum Fisheries Agency with regard to the fishing of tuna, a highly migratory species in the 1980s; for a description of the facts of these disputes and an analysis of the opposite views see B.M.Tsamenyi, 'The South Pacific states, the USA and sovereignty over highly migratory species', 10 *MP* (1986), p. 29 *et seq.*; R.Nadelson (1992), p. 463-4; see also M.Tsamenyi, 'The Jeannette Diana Dispute', 14 (4) *ODIL* (1986), p. 353-367; with regard to disputes created because of the functional nature of the EEZ with regard to security issues see *infra* p. 75-77.

[18] See Chapter 1, p. 52 *et seq*... For a detailed examination of the rights of third states enjoyed in the archipelagic waters see M.Munnavar (1995), p. 157-173.

[19] Article 76 of the LOSC stipulates the conditions for the extension of a state's continental shelf at a distance beyond 200 n.m. from the baselines.

[20] See LOSC article 77 (1) for the continental shelf and article 56 (1) for the EEZ.

archipelago comprises apart from islands other natural features such as islets, rocks, atolls, shoals etc. By virtue of article 121 (3) 'rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'. According to this provision the rocks included in an archipelago cannot generate an EEZ or continental shelf and therefore parts of the waters and the seabed inside the archipelago around rocks will be high seas or parts of the Area respectively, under the assumption, of course, that the rock is not located within the EEZ generated by another neighbouring island. This would create pockets of high seas and of international seabed inside the archipelago where the coastal state would not have the right to explore and exploit the natural resources.[21]

The uncertainty is enhanced by the difficulty in the application of article 121 (3) of the LOSC due to the ambiguous conditions it stipulates with regard to the sustainability of human habitation or the existence of economic life; it is, thus, a matter of interpretation of the wording of this article and of the exact circumstances of each case.[22] The North-western Hawaiian Islands present such an example with regard to the generation of an EEZ by geographic formations having a dubious characterisation as islands or rocks. Van Dyke, Morgan and Gurish have analysed the different possibilities regarding the application of article 121 (3) in the Northwestern Hawaiian archipelago. In the case where some of the islands of the archipelago are considered to be rocks, the EEZ around the islands is much restricted and in some cases even fragmented covering only parts of the archipelago.[23]

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[21] L.Lucchini & M.Voelckel (1990), p. 373 ; These authors stress the different treatment of low-tide elevations (and subsequently of rocks) when they are part of the archipelagic formation : 'une élévation au sol ayant la même taille la même structure les mêmes caractéristiques humaines et économiques aura donc un statut diminue si elle est isolée et un statut 'a part entière' simplement parce qu'elle est comprise dans un system archipélagique'. Due to the ambiguity in the wording of article 121 (3), many states have accorded full effect to islands arguably qualifying as rocks under this article with regard to the generation of EEZ and continental shelf; see B.Kwiatkowska & A.H.A.Soons, 'Entitlement to maritime areas of rocks which cannot sustain human habitation or economic life of their own', 21 *NYIL* (1990), p. 177-8.

[22] J.F.Charney, 'Rock that cannot sustain human habitation', 93 (4) *AJIL* (1999), p. 866-871. M.Gjetnes, 'The Spartlys: Are they Rocks or Islands?', 32 *ODIL* (2001), p. 193-199. B.Kwiatkowska & A.H.A.Soons (1990), p. 150-173.

[23] J.M.Van Dyke, J.R.Morgan, J.Gurish, 'The EEZ of the Northwestern Hawaiian Islands: When do Uninhabited Islands Generate an EEZ' 25 *San Diego Law Review* (1988), p. 482-5 and particularly accompanying figures 1- 6. In the case where the Northwestern Hawaiian Islands were entitled to an archipelagic regime, the EEZ would encircle the whole archipelago. However Barron concludes after examining the various factors defining the archipelago in the legal sense (article 46 (b)) that the North-western Group of the Hawaiian archipelago 'falls short of the definitional standard' and does not consist an archipelago in the legal sense; N.Barron (1980-1), p. 536.

A second limitation concerns particularly the suitability of the EEZ for the case of archipelagos and stems from its functional nature referring to the obligations borne by the coastal state.[24] Apart from the general obligation to conserve and manage the living resources of the EEZ,[25] the coastal state is also obliged to determine the allowable catch of each fish stock in its EEZ (article 61 (1)) and in the cases where it does not have the capacity to harvest the entire allowable catch, to give other states access to the surplus of the allowable catch on the basis of agreements or relevant arrangements (article 62 (2)).[26] It should be however noted that the discretion given to coastal states in deciding the size of the surplus is broad and states may avoid (and in practice have avoided) their obligations set out by the Convention.[27]

On the contrary, the rights regarding the economic exploitation of the natural resources of the archipelagic waters are exclusive to the archipelagic state. The only limitation upon the rights of the archipelagic states with regard to fishing recognised by the Convention refers to the obligation of this state to respect traditional fishing rights of the 'immediate neighbouring States' within the archipelagic waters.[28] In the latter case, the archipelagic state will recognise these rights on the basis of bilateral agreements between itself and the states concerned.

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[24] The regime of the EEZ is actually of a cooperative nature regarding the exploitation and preservation of the living resources with the view to promoting the optimum utilisation of the resources in the EEZ. See particularly article 61 (2) of the LOSC.

[25] According to article 61 (1) and (2) the coastal state is under the obligation to adopt the appropriate conservation and management measures so that the living resources in the EEZ are not endangered by over-exploitation and that the fish stocks are maintained at 'levels which can produces the maximum sustainable yield.

[26] Furthermore, land-locked and geographically disadvantaged states of the same region or subregion have a 'guaranteed' right of access to the surplus of the living resources of the EEZ (article 69-70).

[27] R.R.Churchill and A.V.Lowe (1999), p. 290-1; E.D.Brown (1994), p. 222-3; D.P.O'Connell (1984-5), p. 565. D.J.Attard (1987), p. 47-50. G.V.Galdorisi & A.V.Kaufman, 'Military Activities in the EEZ: Preventing uncertainty and defusing conflict' 32 *California Western International Law Journal* (2001-2), p. 278; It is argued that this broad discretion and the weakness of the provisions on dispute settlement (article 297 (3) LOSC) reduce the ambit of the obligations borne by coastal state for sharing the fishing resources. E.D.Brown (1994), p. 222-4. Brown emphatically concludes that the restraints upon the sovereign rights of the coastal state are minimal and coastal states may - if they so wish - 'transform their limited sovereign rights into practically unlimited sovereignty over the living resources of the zone'. See also S.Garcia, J.A.Gulland & E.Miles, 'The new Law of the Sea and the access to surplus fish resources: Bioeconomic reality and scientific collaboration', 10 *MP* (1986), p. 193, where the authors contend that 'this jurisdiction is not absolute in theory but in practice there are no real constraints on the exercise of coastal state authority'.

[28] O'Connell noted that the obligations borne by an archipelagic state to negotiate fishing agreements with its neighbours would put 'the archipelagic state from a practical point of view, in much the same situation as if it claimed only an EEZ'. D.P.O'Connell (1984-5), p. 258. However, this observation is not true as the notion of neighbouring states enjoying traditional rights is much more restricted than the number of states which could have access to the fishing resources of the EEZ of a state.

B. Environmental aspects

It is certain that a uniform regime where the state could legislate and enforce regulations regarding the prevention, reduction and control of pollution would offer more effective protection than a multi-zone regime of various jurisdictions and competences.[29]

The regime with regard to the protection and preservation of the marine environment in archipelagic waters is not clear. Part XII sets forth a legal framework for the protection of the marine environment covering pollution in all maritime zones. However, despite the fact that there are detailed provisions with regard to the legislative and enforcement jurisdiction of the coastal state in its territorial sea, its EEZ and lastly in the case of straits of international navigation, there is no reference with regard to the jurisdiction of the archipelagic state in respect of pollution by foreign vessels in its archipelagic waters. It would appear that the archipelagic state has the general legislative jurisdiction provided in article 21 regarding innocent passage which provides that 'the coastal state may adopt law and regulations ... in respect of the conservation of the living resources and the preservation of the environment of the coastal state and the prevention, reduction and control of pollution thereof'. In the case where passing vessels do not comply with the regulations of the coastal state, the 'coastal state may take the necessary steps in its territorial sea to prevent passage which is not innocent' including suspension of the innocent passage of foreign ships as provided in article 25 (1-3).

Churchill and Lowe point out that this effect is indeed anomalous as it seems that 'an archipelagic state has less enforcement jurisdiction over foreign vessels in matters of pollution than a non-archipelagic state in its territorial sea or straits or than the archipelagic state itself has in its own territorial sea lying *beyond* its archipelagic water' (emphasis in the original text) adding that this could be attributed to an 'oversight in drafting'.[30] Nordquist, however, contends that article 233, which is based on the competence of the state bordering the state to enact legislation regarding the protection of the environment by virtue of article 42 (1) (b), which applies *mutatis mutandis* to archipelagic water, may be applied in the case of archipelagic waters and

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[29] See D.P.O'Connell (1974-5), p. 254-5.
[30] R.R.Churchill & A.V.Lowe (1999), p. 127-8; see also A.Dale (1978), p. 61.

give the archipelagic state additional competence with regard to the protection of the environment in the archipelagic sea-lanes.[31] But even this result would be undesirable, as it would mean that the archipelagic state has extended jurisdiction in the archipelagic sea-lanes with regard to pollution but not in the rest of the archipelagic waters.

One should, however, consider the following two aspects of the archipelagic regime with regard to the determination of the enforcement jurisdiction for the protection of the marine environment enjoyed by the archipelagic state in its waters. Firstly, archipelagic waters are a part of the sea where the archipelagic state exercises sovereignty. Secondly, Part II Section 3 referring to the right of innocent passage in the territorial sea is applicable to archipelagic waters by virtue of article 52 (1). Therefore, since the right of innocent passage is exercised by foreign vessels in archipelagic waters as it is exercised in the territorial sea and since article 220 (2) regarding the enforcement jurisdiction exercised by a coastal state in its territorial sea specifically refers to Part II section 3, functioning in a way as a specification of the measures that may be taken by a coastal state against a vessel violating the laws and regulation regarding the protection of the environment while exercising its right of innocent passage, it should be concluded that article 220 (2) should also be applicable in the case of archipelagic waters. Therefore, the archipelagic state enjoys in archipelagic waters the same enforcement jurisdiction with regard to environmental issues as that enjoyed by the coastal state in its territorial sea.[32]

On the contrary, in the EEZ the enforcement jurisdiction of a coastal state is more limited.[33] The coastal state does not have a general right to arrest foreign vessels

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[31] M.H.Nordquist (ed), *United Nations Convention on the Law of the Sea: A Commentary* Vol. II (Dordrecht: Nijhoff, 1993), p. 487. Oxman also states that article 233 applies in the case of archipelagic waters (but denies the fact that this article may be applied in the case of discharges by ships that violate standards accepted by their flag state in another instrument); B.H.Oxman, 'Environmental Protection in Archipelagic Waters and International Straits – The Role of the International Maritime Organisation' 10 *IJMCL* (1995), p. 478.

[32] I.A.Shearer, 'Problems of Jurisdiction and Law Enforcement against Delinquent Vessels', 35 *ICLQ* (1986), p. 333. However, Oxman in his analysis of the environmental protection in archipelagic waters refers solely to the application of the provisions of Part II Section 3 on innocent passage in the territorial sea without making any reference to the enhanced enforcement jurisdiction of Section 6 of Part XII; B.H.Oxman (1995), p. 475-8

[33] By virtue of article 56 (1) (b) (iii) the coastal state has jurisdiction in its EEZ with regard to the protection and preservation of the marine environment 'as provided for in the relevant provisions of this Convention'. Article 211 (5) provides for the legislative competence of the coastal state in its EEZ: 'coastal States, for the purpose of enforcement as provided for in section 6, may in respect of their

in its EEZ for breach of regulations referring to the protection of the marine environment[34] and the LOSC recognises three different levels of enforcement jurisdiction attributed to the coastal state[35] 'according to the degree of harm caused or threatened by such violations'[36] and according to the degree of proof with regard to the existence of the violation of environmental regulations.[37] It should, however, be noted that states have tried to expand their jurisdiction in the EEZ particularly imposing restrictions upon the freedom of navigation of vessels carrying ultrahazardous nuclear cargoes.[38] This state practice manifests the need for enhanced coastal jurisdiction in terms of environmental protection in the waters close to the coasts. This argument is even more important for archipelagos which due to their geographic realities face more dangers related to pollution of the marine environment.[39]

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exclusive economic zones adopt laws and regulations for the prevention, reduction and control of pollution from vessels conforming to and giving effect to generally accepted international rules and standards established through the competent international organisation or general diplomatic conference'. In cases where these rules may be deemed inadequate to provide sufficient ecological protection for certain areas of the EEZ, the Convention permits the coastal state to adopt in certain parts of its EEZ (special areas) regulations implementing international rules and standards or navigational practices related to special areas in collaboration with the competent international organisation or adopt additional regulation of its own (article 211 (6)).

[34] R.R.Churchill & A.V.Lowe (1999), p. 348-9.

[35] Initially in case of violation of applicable anti-pollution international rules and standards the coastal state 'may require the vessel to give information regarding its identity and port of registry, its last and its next port of call and other relevant information required to establish whether a violation has occurred' (article 220 (3)); in the case where the violation has led to a substantial discharge causing or threatening significant pollution of the marine environment, the coastal state 'may undertake physical inspection of the vessel for matters relating to the violation if the vessel has refused to give information or if the information supplied by the vessel is manifestly at variance with the evident factual situation and if the circumstances of the case justify such inspection' (article 220 (5)); lastly in the case where the violation has resulted in a discharge causing major damage or threat of major damage to the coastline or related interests of the coastal state or to any resources of its territorial sea or exclusive economic zone, the coastal state shall institute proceedings, including detention of the vessel in accordance with its law' (article 220 (6)). Some commentators point out that the distinction between 'substantial discharge' and a 'discharge causing major damage' is not clear-cut and will prove difficult in practice; R.R.Churchill & A.V.Lowe (1999), p. 349; D.P.O'Connell (1974-5), p. 995.

[36] B.Kwiatkowska (1989), p. 181.

[37] In the first two cases, the coastal state should have 'clear grounds for believing' that the violation took place (article 220 (3, 5)) whereas in the third case the degree of proof required is much higher as the provision necessitates that there should be 'clear objective evidence' of the violation (article 220 (6)).

[38] See the discussion on this issue in J.M.Van Dyke, 'The disappearing right to navigational freedom in the EEZ', 29 (2) *MP* (2005), p. 110-112, 121; Van Dyke argues that it appears that a new norm of customary international law has emerged allowing states to 'regulate navigation through their EEZ based on the nature of the ship and its cargo'.

[39] See Chapter 1, p. 37 on environmental considerations.

C. Navigation-related issues

Restriction of freedom of navigation and overflight in the waters of an archipelago has been deemed necessary for its protection particularly in terms of security.

In the case where the waters inside the archipelago have the status of the EEZ, article 58 (1) of the LOSC provides that third states will enjoy the freedoms of 'navigation, overflight by aircraft and of the laying of cables and pipelines and other internationally lawful uses of the sea related to these freedoms, such as those associated with the operation of ships, aircraft and submarine cables and pipelines and compatible with the other provisions of this Convention'.[40] These freedoms will be exercised by third states as they would be exercised on the high seas as provided in article 87 of the LOSC to which article 58 (1) cross-refers.[41] Therefore, third states' vessels, commercial, state or military, enjoy the right of free navigation and overflight through the EEZ of a coastal state.[42] It should be pointed out that coastal states have showed a tendency in imposing restrictions upon the freedom of navigation in various respects.[43] This tendency is, however, resisted by other states.[44]

On the contrary, in the archipelagic waters third states' vessels enjoy the right of innocent passage and the right of archipelagic sea-lane passage in the sea-lanes specifically designated by the archipelagic state. The right of overflight is solely recognised in air routes above the designated sea-lanes. In archipelagic waters both navigational rights entrusted to third states concern 'passage' which should be continuous and expeditious under the conditions of articles 18 and 19 in the case of innocent passage[45] and article 53 in the case of archipelagic sea-lanes passage. The meaning of passage is much narrower than the freedom of navigation recognised in

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[40] In particular, the right of overflight and the right of submarines to navigate submerged in the EEZ waters were of primary significance for major maritime powers which were not willing to have the mobility of their military navy restraint in the EEZ; see J.C.Phillips, 'The Exclusive Economic Zone as a Concept in International Law', 26 *ICLQ* (1977), p. 586-7.

[41] B.Kwiatkowska (1989), p. 200.

[42] These freedoms are not unqualified but they are subject to restrictions stemming from the functional character of the zone especially with regard to the rights of the coastal state to explore and exploit the natural resources of the EEZ (see for example article 59 (3) LOSC); F.Orrego Vicuna (1989), p. 94-5.

[43] See J.M.Van Dyke (2005), p. 107 *et seq.*

[44] *Ibid.*

[45] Note also that various states argue that prior notification or authorisation is needed for the passage of military vessels in their territorial sea; for this debate see Chapter 1, p. 54 note 205.

the EEZ as the latter entails apart from *stricto senso* passage rights, other rights such as naval manoeuvres.

D. Issues related to the security of the archipelago

The security of the archipelago either in terms of internal security such as prevention and control of illegal immigration, smuggling of goods and trafficking of drugs[46] and protection against piracy or in terms of external security such as defence against a foreign aggressor and protection of the territorial sovereignty is a major concern of archipelagic states and states in possession of archipelagos.[47] The zones of coastal jurisdiction prescribed in the LOSC do not seem to be able to assuage such concerns.[48]

(i) Internal security aspects

With regard to the jurisdiction of the coastal state for internal security matters, the Convention provides for the right of the coastal state to exercise control in a zone extending 24 nautical miles from the baselines (contiguous zone) regarding specific issues and particularly the prevention and punishment of infringement of its customs, fiscal, immigration or sanitary law and regulations within its territory or territorial sea (article 33 of the LOSC).[49] Article 33 ascribes to the coastal state only enforcement jurisdiction and not legislative[50] for offences committed in the territorial sea of the coastal state and not in the contiguous zone and solely with regard to the issues prescribed in this article. The coastal state does not have jurisdiction regarding

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[46] See M.S.McDougal & W.T.Burke (1962), p. 412; they point out that 'exercise of control for implementation of local policies on matters of special importance to all states, such as immigration, entry of aliens and import and export problems becomes extraordinarily difficult in these circumstances. The length of coastline which needs to be protected against intrusion for circumvention of local policies is very great in relation to the land mass involved and presents unusual problems for local authorities'.

[47] *Ibid*, p. 412: 'The military aspect of security is also complicated by the geographical situation. Espionage and surveillance are made less difficult since the ocean areas involved are often so vast that the coastal state can hardly maintain a regular watch over all means of access to the various islands or even to one large island. Foreign naval strength may be a peculiarly potent threat to local decision processes when ocean communication is so vital to the functioning of the community and, in concrete cases, so vulnerable to just such threats'.

[48] R.P.Anand (1979), p. 254.

[49] The contiguous zone in not automatically ascribed to the coastal state but each state must declare its claim to one; R.R.Churchill and A.V.Lowe (1999), p. 135; E.D.Brown (1994), p. 129.

[50] R.R.Churchill and A.V.Lowe (1999), p. 137; E.D.Brown (1994), p. 133 –4; A.V.Lowe, 'The development of the concept of the contiguous zone', 52 *BYIL* (1981), p. 165. However, Fitzmaurice has argued that 'it is ... control and not jurisdiction that is exercised. The power is primarily that of a policeman rather than of the administrator or of the judge', Sir G.Fitzmaurice (1959), p. 113.

violation of its security in the contiguous zone.[51] The practice of some states claiming security jurisdiction in their contiguous zone has been criticised as incompatible with the LOSC and has been protested by other states.[52] This tendency in the practice of states may reflect the concerns of coastal states regarding the inadequacy of the contiguous zone regime for security purposes; these concerns are even stronger for archipelagos, which due to their geographic peculiarities are more prone to security dangers than coastal states.

The safeguards provided by the adoption of a contiguous zone may not be considered adequate for the effective management of the internal affairs of an archipelago.[53] What is more, this limited jurisdiction is only restricted to the zone of 24 nautical miles measured from the baselines and does not exist in the EEZ of the coastal state. In the EEZ *per se*, a coastal state has jurisdiction over artificial islands, installations and structures 'including jurisdiction with regard to customs, fiscal, health, safety and immigration law and regulations' (article 60 (2)). The coastal state, therefore, does not have any jurisdiction upon vessels committing offences referring to its security laws such as immigration, fiscal, custom and health issues in its EEZ unless the infringement of these law has a direct or indirect effect on the national laws referring to the sovereign rights or the jurisdiction attributed to the coastal state by the Convention such as the preservation and management of the living or non-living resources or the establishment and use of artificial islands and installations (article 56 of the LOSC).[54]

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[51] Proposals regarding the exercise of jurisdiction related to security issues during UNCLOS III were opposed and finally excluded from the provision of the Convention regarding the contiguous zone; see Sh.Oda, 'The concept of the Contiguous zone', 11(1) *ICLQ* (1962), p. 131-153, esp. p. 147 *et seq.*. See also A.V.Lowe (1981), p. 164-7.

[52] See J.A.Roach & R.W.Smith (1996), p. 172 footnote 5. The states whose legislation provides for jurisdiction over security issues in their contiguous zone are the following (as listed by these authors): Bangladesh, Burma (now Myanmar), Cambodia, China, Egypt, Haiti, India, Iran, Nicaragua, Pakistan, Saudi Arabia, Sri Lanka, Sudan, Syria, United Arab Emirates, Venezuela, Vietnam and Yemen.

[53] H.W.Jayawardene (1990), p. 108. J.R.Coquia (1962), p. 155.

[54] Article 73 (1) LOSC. The jurisdictional regime of the EEZ was examined by the International Tribunal for the Law of the Sea in the first case referred to it, the M/V Saiga Cases No. 1-2 (found at www.itlos.org) where the Tribunal by an overwhelming majority of 18 to 2 held that the arrest of the M/V Saiga in the EEZ of Guinea on the basis of the infringement of that states' custom regulations was in violation of international law regarding the rights and jurisdiction enjoyed by the coastal state in the EEZ. It is interesting that Guinea tried to justify its actions on the basis of its right 'to protect itself against unwarranted economic activities in its EEZ that considerably affect its public interest' (Judgment, para. 128). These arguments were rejected by the Tribunal by stating that the Convention 'does not empower a coastal state to apply its customs laws in respect of any other parts of the exclusive economic zone' (Judgment, para. 127).

(ii) External security of the archipelago – Military uses of the sea

During the negotiations in UNCLOS III there were some proposals submitted by developing states regarding the adoption of a protective framework for the national security of the coastal state in its EEZ.[55] However, these proposals were insufficiently supported and subsequently excluded from the draft text.[56] Therefore, the Exclusive Economic Zone does not have a security dimension, that is the coastal state does not have competence or jurisdiction with regard to security issues.[57]

Another implication for the security of the archipelago regards the performance of military activities by foreign states' navies. The issue of military activities in the EEZ is controversial and state practice and commentators are divided. On one hand, it is argued that military activities such as naval manoeuvres, weapons practice, the emplacement of sensor arrays, aerial reconnaissance or collection of military intelligence regarding foreign activities at sea are allowed as internationally lawful uses of the sea in the framework of the freedom of navigation and the freedom of laying of submarine cables and pipelines, freedoms which may be exercised by third states in the EEZ.[58] On the other hand, it is doubted whether activities such as exercises involving weapons testing, such as launching torpedoes and firing artillery or the covert laying of arms, could be included within those freedoms[59] and it is believed that this issue should be resolved on the basis of residual rights according to article 59 of the LOSC.[60]

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[55] Alt. Arias Schreiber, 'The EEZ: its legal nature and the problem of military uses', in F.Orrego Vicuna (1984), p. 140.

[56] *Ibid.*

[57] In a broader sense, Nadelson notes that 'the EEZ is an exclusive economic zone, not a political one. The implied limitation of this wording refines the precise interest of the EEZ to one that addresses economic needs and interests, not juridical or political ones'; R.Nadelson (1992), p. 482.

[58] B.H.Oxman, 'The Regime of Warships Under the UN Convention on the Law of the Sea', 24 *Virginia Journal of International Law* (1984), p. 837-8. He specifically points out that in principle military activities are permitted as long as they do not infringe the rights of the coastal state. See also B.Kwiatkowska (1989), p. 203; B.Kwiatkowska, 'Military uses in the EEZ – A Reply', 11 *MP* (1987), p. 249-250; G.V.Galdorisi & A.G.Kaufman (2001-2), p. 274; E.Rauch, 'Military uses of the oceans;, 28 *GYIL* (1985), p. 252; R.W.G.de Muralt, 'The Military Aspects of the new Law of the Sea Convention', 32 *NILR* (1985), p. 95.

[59] T.Scovazzi, *'The evolution of International Law of the Sea: new issues, new challenges'*, 286 *Recueil des Cours* (2000), p. 167.

[60] A.V.Lowe, 'Some legal problems arising from the use of the seas for military purposes', 10 *MP* (1986), p. 179-80; see also A.V.Lowe, 'Rejoinder', 11 *MP* (1987), p. 250-1. Scovazzi points out that in the case of operations including weapons 'the balance of interests established by article 59 would in most cases play in favour of the coastal state'; T.Scovazzi (2000), p. 167. Brown concludes that in principle military activities could be deemed as part of the lawful uses of the sea related to the freedom

Finally, another issue concerns the emplacement and use of military devices, installations and structure on the seabed within the EEZ such as sonar monitoring or surveillance systems like acoustic array systems and navigational aids for submarines and warships, the legality of which is doubted by some states and authors especially with regard to such installations referring to weapon systems but is accepted by others as part of the freedom of laying cables and pipelines explicitly attributed to third states.[61]

Nowadays, the status of the EEZ with regard to security is ambiguous due to the attempts of coastal states to restrict navigational rights and military operations of foreign vessels in their EEZ[62] and the opposing practice of maritime states to assert their rights of military and intelligence gathering activities.[63] This disagreement stems from the ambiguity of the LOSC provisions[64] but also from the technological advances with regard to military and intelligence gathering activities, the rise in the size and quality of many nations' navies and the increase on security concerns

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of navigation but each case should be examined on its merits based on the particular conditions of each case especially regarding the use of weapons and the impact of these activities on the sovereign rights of the coastal state; E.D.Brown (1994), p. 241-2. According to the 'due regard' obligation borne by third states by virtue of article 58 (3), the naval operations in a foreign EEZ should not affect the sovereign rights of the coastal state regarding the exploitation and preservation of the natural resources and the environment; Ibid, p. 279, 283. D.J.Attard (1987), p. 68. Van Dyke also referring to naval manoeuvres and exercises points out that they may be considered permissible as long as they are conducted in a non-threatening manner and in a fashion compatible with other provisions of this convention., J.M.Van Dyke, 'Military ships and planes operating in the exclusive economic zone of another country', 28 *Marine Policy* (2004), p. 35. See also M.Hayashi, 'Military and intelligence gathering activities in the EEZ: definition of key terms', 29 *MP* (2005), p. 132-3 (and references cited therein, footnotes 71-4).

[61] For an analysis of the opposite arguments see T.Treves, 'Military Installations Structures and Devises on the Seabed, 74 *AJIL* (1980), p. 808-857; R.Zedalis, 'Military installations, structures and devices on the seabed: a response', 75 *ibid* (1981), p. 926-33; T.Treves, 'Reply', *ibid*, p. 933-935. See also M.Hayashi, 'Military and intelligence gathering activities in the EEZ: definition of key terms', 29 *MP* (2005), p. 129-130, 131-2. Similarly, the legality of military intelligence gathering activities in the EEZ of a foreign state is doubted especially on the basis of technological advances with regard to the increasing electronic warfare (EW) and information warfare (IW) capabilities; see M.Hayashi, *ibid*, p. 130.

[62] there is a number of states, which have made a declaration upon their ratification of the LOSC that the authorisation of the coastal state is required for the carrying out of military exercise or manoeuvres or the deployment of military installations in their EEZ and other states which have declared this practice as incompatible with the LOSC; see the Declarations upon ratification of Brazil, Bangladesh, Cape Verde, India, Malaysia, Pakistan and Uruguay found at www.un.org/depts/los/DECLARATIONS.htm. Opposing declarations have been filed by Germany, Italy, the UK and the Netherlands.

[63] See G.V.Galdorisi & A.G.Kaufman (2001-2), p. 292-296. J.M.Van Dyke, Military ships and planes operating in the exclusive economic zone of another country', 28 *MP* (2004), p. 32-6.

[64] See A.S.Skaridov, 'Naval activity in the foreign EEZ – the role of terminology in law regime', 29 *MP* (2005), p. 153; M.Hayashi, 'Military and intelligence gathering activities in the EEZ: definition of key terms', *ibid*, . 124.

worldwide.[65] This trend is likely to lead to the proliferation of incidents regarding mainly military and intelligence gathering activities in foreign EEZs.[66] These concerns are important for archipelagos which are, due to their geographical realities, prone to dangers related to their security. The EEZ regime, as manifested by the tendency of coastal states to circumvent its provisions, is insufficient to address archipelagic concerns related to the security of the archipelago.

On the contrary, in archipelagic waters, third states cannot perform any military activities without the consent of the archipelagic state. Exercising their right of innocent and archipelagic sea-lane passage, third states' vessels should restrict themselves to the expeditious and continuous passage.

E. Psychological reasons

A reason supporting the archipelagic concept as advocated by archipelagic states and other archipelagos concerned the preservation of the distinct identity of the archipelago and particularly of its people[67] or as stated by Brown the satisfaction of the 'need to contain centrifugal tendencies and cement the elements of the nation together'.[68] This identity does not refer only to the nation but also to the local identity, which is very important for the people who live in this particular area. They feel that they belong to a community, the bonds of which are enhanced by the treatment of the

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[65] M.J.Valencia, 'Introduction: Military and intelligence gathering activities in the EEZs: Consensus and disagreement II' Editorial, 29 *MP* (2005), 97-99; M.J.Valencia & K.Akimoto, 'Report of the Tokyo Meeting and Progress to date', *ibid*, p. 102-5.

[66] Lowe suggest that the 'lack of clarity in the Convention is likely to result in international friction, as states with conflicting interpretations of the text seek to exercise their rights as they perceive them'; A.V.Lowe, 'Some Legal Problems arising from the use of the seas for military purposes', 10 *MP* (1986), p. 178. Valencia points out that 'military and intelligence gathering activities in the EEZs will likely become more intensive, intrusive, controversial and dangerous; M.J.Valencia, 'Conclusions and the way forward', 29 *MP* (2005), p. 185. For a discussion on issues arisen by the implication of military and intelligence gathering activities in the EEZ see M.Hayashi (2005), p. 123 *et seq.*; see also G.V.Galdorisi & A.G.Kaufman (2001-2), p. 292-6.

[67] See for example, the Philippines delegate depicted this idea by stating that 'that essential element of unity formed the basis of the desire of an archipelagic state to preserve its identity as one State and one nation, for otherwise an archipelago might be splintered into as many islands as composed it, with the consequent fragmentation of the nation and the State'; GA Off.Rec., 28th Session, 21 (A/9021), A/AC.138/SC.II/SR.53, p. 63. Philippines also stressed the issue of national identity, as it was a vital issue for the newly independent state of Philippines, which does not present a cultural, linguistic, religious and ethnic unity among its population: J.W.Dellapenna (1970), p. 46.

[68] E.D.Brown (1994), p. 109.

archipelago as a unit.[69] The unification of the scattered islands of the archipelago enhances the belief of archipelagic people that they are part of a viable community. [70] Especially in cases where the archipelago is far away from the mainland, it is important even for the state itself to be able to offer its archipelagic citizens the feeling of stability and unity, represented by a common identity, within the archipelago where they live.[71]

In the case of overseas self or non-self governed territories,[72] it is very important for the population of the archipelago, which are in most cases indigenous, to be able to preserve their ethnic identity, which is intertwined with the notion of the archipelago[73] and exercise their fundamental right of exploiting the natural resources. Thus, the unification of the archipelago is as important to them as it is, for example, for the people of Indonesia.

Therefore, the functional zones solution for the case of archipelagos is inadequate in order to preserve the unity of the archipelago as a distinct vital community and to safeguard the identity for the archipelagic people regardless of the political status of the archipelago.[74] Commentators rejecting the necessity of the archipelagic regime have admitted this 'psychological gain';[75] it is indeed important

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[69] See the statement of Senator Rioz Perez from the political party Coalicion Canaria in the presentation in the Senate of the draft law concerning the application of an archipelagic regime to the Canary Islands; Cortes Generales, Diario de Sessiones del Senado, VII Leg. No. 125, p. 7741.

[70] The Bahamas representative referred also to the need to preserve the political and psychological unity of the Bahamian people referring particularly to the people and not to the state itself; UNCLOS III Off.Rec., Vol. II, Second Committee, 36th Meeting, para. 76, 77 and 79-81.

[71] Jayawardene albeit reluctant to accept the claims by continental states upon their midocean archipelagos seems to agree with this view; in particular, he states that '... the claims of continental states possessing such islands groups at least in some cases merit sympathetic considerations as the imperative and problems inherent in preserving the integrity of island territories distant from the metropolitan territory may appear to be as cogent as in the case of archipelagic states', H.W.Jayawardene (1990), p. 142.

[72] The case of self-governing and non-self-governing archipelagic territories is discussed in Chapter 5.

[73] See for example the case of Hawaii in Elizabeth Pa Martin & John Kekoa Burke, 'Ocean Governance Strategies: Governance in Partnership with Na Keiki o ke kai, the Children of the Sea' in T.A.Mensah, *Ocean Governance for Hawaii* (University of Hawaii: The Law of the Sea Institute Special Publication, 1995), p. 177. It is argued that Hawaii's archipelagic geography and environment continues to dominate people's lives and that the sea and its bounty is a vital element in Hawaiian culture; *Ibid*, page 174.

[74] Kusumaatmadja pointed out the a multi-functional regime would not satisfy the need for archipelagic 'national' unity; M. Kusumaatmadja (1973), p. 176.

[75] See R.D.Hogson & R.W.Smith (1976), p. 244

for the state and its people to know that the compactness of their archipelago and the unity of the land and the waters of it have been universally recognised.[76]

2.2.2 Unitary regime vs. multi-zone regime

Apart from the inadequacy of the multi-functional regime in terms of the competences attributed to the state for the protection of its various needs and interests, which has been analysed in the preceding subsections, the functional zones idea comes in conflict with the archipelagic principle, in the sense that the former is land-based whereas the archipelagic concept is water-based. In fact, the archipelagic concept is based on the special nature of the archipelago where the land and the waters of the archipelago interact. The unitary theory presupposes that the status of the waters of the archipelago should be integrated in a uniform whole and attributed a special regime resembling the regime of the land, so that the archipelago will be able to confront the problems stemming from its geographic particularities.

In a more practical sense, the multiplicity of the zones in the waters of the archipelago would create problems with regard to the proper applicability of such a regime and mainly with regard to the enforceability of the laws for the protection of the archipelago. Kusumaatmadja stressed the problems created due to the lack of staff for the enforcement of the regulations for each of the different zones.[77] Such a regime would be indeed problematic with regard to the enforcement jurisdiction particularly as third states' vessels may escape arrest by fleeing in parts of the archipelago where the state has no jurisdiction, such as the EEZ (in this zone the state has limited enforcement jurisdiction) or pockets of the high seas inside the archipelago.[78]

Apart from the need to have the waters of the archipelago integrated in a uniform regime, another important attribute of the archipelagic concept is the consideration of the archipelago as a compact whole for the generation of the maritime zones. Indeed, the archipelagic concept is reflected in the application of straight baselines encircling the archipelago and subsequently in the measurement of

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[76] Anand characteristically states that 'the psychological feeling of its various islands and sea between them being universally accepted as one unit is no mean gain for an archipelagic state and its people'; A.Anand (1979), p. 254; H.P.Rajan, 'The Legal Regime of Archipelagos', 29 *GYIL* (1986), p. 153.
[77] *Ibid.*
[78] See the Philippines *note verbale* addressed to the UN: UN Doc A/CN 4/99, Note verbale dated 10th January 1956 from the Permanent Mission of the Philippines to the United Nations, in *ILC*, vol. II, p. 70.

the various maritime zones from these straight baselines. This recognises the interdependence of the land of the islands and the waters among them and treats them equally as a compact whole. The generation of the maritime zones from the straight baselines ensures also the protection of the 'fragile' security of the archipelago. The encirclement of the archipelago as a whole by territorial waters enhances the security of the archipelago as third states' vessels have restricted navigation rights in the territorial sea and therefore cannot approach or enter the archipelagic waters easily. This objective cannot be ensured by the multi-zone regime.

2.3 Possibilities arising from the LOSC with regard to the application of straight baselines to dependent outlying archipelagos

According to article 121 of the LOSC titled 'the regime of islands', 'the territorial sea, the contiguous zone, the exclusive economic zone and the continental shelf of an island are determined in accordance with the provisions of this Convention applicable to other land territory'; therefore, the rules regarding baselines for the delimitation of the territorial sea as enshrined in Part II Section 3 of the LOSC will apply *mutatis mutandis* in the case of islands.[79]

Article 5 of the LOSC provides that 'except where otherwise provided in this Convention, the normal baseline for measuring the breadth of the territorial sea is the low-water line along the coast as marked on large-scale charts officially recognised by the coastal state'. Apart from Part IV on archipelagic states, there are three exceptions to the low-water mark stipulated in the Convention referring to the baselines used for the measurement of the maritime zones: articles 7, 9 and 10. Article 9, which refers to the application of straight baselines for the purpose of the measurement of the maritime zones in the case of the mouth of a river flowing directly into the sea, is apparently inapplicable to the case of archipelagos. Article 10 on bay closing lines may have limited applicability to groups of islands. On the contrary, article 7 on straight baselines in coasts fringed by islands may be of importance for the case of groups of islands. In the following subsections, article 7 and 10 are examined with regard to their potential application to groups of islands.

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[79] See P.B.Beazley, *Maritime Limits and Baselines: A guide to their delineation*, Sp. Publ. No 2 (3rd Ed) (London: The Hydrographic Society, 1987), p. 8.

2.3.1 Article 7 of the LOSC: straight baselines in coasts fringed by islands

Article 7 of the LOSC which provides for the application of a system of straight baselines 'in localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity'[80] may be used - under conditions - for the measurement of the maritime zones of groups of islands. It should be noted that before the consideration of archipelagos as a separate issue in UNCLOS III, most proposals provided for the use of the concept of straight baselines (an application of which is article 7) in the case of archipelagos.[81] This article has its origins in the 1951 *Fisheries case* where the ICJ found that the straight baselines applied by Norway in its coasts was valid under international law; the conditions used by the ICJ in the examination of the validity of this system and the principles enunciated therein were incorporated in article 4 of the TSC which was transferred verbatim to article 7 of the LOSC.[82]

It is obvious that this article cannot refer to an outlying archipelago as a whole, since such an archipelago is detached from the mainland and, thus, cannot be considered to fringe any coast.[83] However, article 7 may be applied to an outlying archipelago on a localised basis, that is, in parts where 'fringes' of islands are in the immediate vicinity of the coast of one of the islands of the archipelago or to small groups of islands presenting such characteristics. Indeed, it has been argued that in the case where a relatively large island is fringed by other smaller situated in its immediate vicinity, the application of a system of straight baselines joining the fringing islands and the coast of the main island may be justifiable under article 7, as long as the general conditions of this article are met.[84]

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[80] Article 7 (1) of the LOSC; article 4 (1) of the 1958 Geneva Convention on the Territorial Sea has the exact same provision.

[81] See Chapter 1, p. 15 et *seq*...

[82] See Chapter 1, p. 26.

[83] Scovazzi points out that 'to link to the mainland an archipelago located at a considerable distance from the coast would be in conflict with the rule'. T.Scovazzi, 'The establishment of Straight Baselines Systems: The Rules and the Practice' in D.Vidas & W.Ostreng (eds), *Order for the Oceans at the Turn of the Century* (The Hague: Kluwer Law International, 1999), p. 447.

[84] J.R.V.Prescott, 'Straight and Archipelagic Baselines' in G.Blake (ed), Maritime Boundaries and Ocean Resources (London: Croom Helm, 1987), p. 45; P.B.Beazley (1987), p. 13-14; J.R.V.Prescott, 'Straight Baselines: Theory and Practice' in E.D.Brown & R.R.Churchill (eds), *The UN Convention on the Law of the Sea: Impact and Implementation* (The Law of the Sea Institute, University of Hawaii, 1987), p. 314-315. Jayawardene suggests that article 7 of the LOSC can be applied only in the case of island states, that is states that have an insular formation like Madagascar, Cuba, Iceland, the UK and

The possibility of applying article 7 to groups of islands has been acknowledged in principle by the ICJ in the *Qatar-Bahrain case*. Despite the fact that Bahrain argued in favour of the application of the archipelagic regime on the basis of its being a *de facto* archipelagic state (multi-island state),[85] the Court found that it was not required to take a position on this issue,[86] but examined whether Bahrain could apply a straight baseline system on the basis of article 7 in some parts of its coast. The Court concluded that the conditions of article 7 were not met and pointed out that 'in such a situation, the method of straight baselines is applicable only if the State has declared itself to be an archipelagic state under Part IV of the 1982 Convention on the Law of the Sea, which is not true of Bahrain in this case'.[87] It is clear that the Court acknowledged that article 7 may be applied to groups of islands as long as the conditions of this article are met; failing to meet the criteria stipulated in article 7, straight baselines can only be justified on the basis of the archipelagic regime applicable solely to archipelagic states which have declared such a status. On the contrary, the ICJ in the *Libya-Malta case* refrained from expressing any opinion with regard to the baseline system applied by Malta in the archipelago;[88] it, however,

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Ireland, while 'dependent islands clearly do not count as mainland'. Although he does not clarify the reason for this distinction, he accepts that in practice states have drawn straight baselines along the coast of islands and he concludes that 'if baselines can be drawn around individual dependent islands, there is little reason for denying their applicability to island groups'. H.W.Jayawardene (1990), p. 76-77.

[85] *Qatar/Bahrain case*, para. 32-34, 180-183; see the arguments of Bahrain in support of its archipelagic claim: Memorial of Bahrain, Pleadings, Vol. 1, p. 287-296; see also the counter-arguments raised by Qatar, see Memorial of Qatar, Pleadings, Vol. 1, p. 262-4.

[86] *Ibid*, para 183.

[87] *Ibid*, para. 214; see also the dissenting opinion of Judge Bernardez, paras.55-58, 462-6, 479, 507, 511; Judge Bernardez stated that despite the fact that the Court fairly rejected any archipelagic status for Bahrain or the application of straight baselines in its coasts, it took into consideration its archipelagic formation when considering the basepoints to be used for the maritime boundary delimitation: see particularly paras. 479, 507: 'On the other hand, once the "archipelagic baselines" and the "straight baselines" are excluded, the Judgment is *without any Bahraini line serving as a baseline* for the (emphasis in the original text) construction of its "equidistance line". What it does for this operation is to replace the coastal mainland baseline of Bahrain by a series of selected "basepoints" in the minor islets, rocks and sand banks already referred to and in and low-tide elevations considered to be in the territorial sea of Bahrain alone. These features are rather isolated from each other. They have been selected, according to the Judgment, bearing in mind the pleadings and arguments of Bahrain in the present proceedings and related rules invoked. No Bahraini "basepoint" is situated on the mainland coast of Bahrain'.

[88] *Libya/Malta case*, p. 48, para. 64. See Figure 1 in Appendix for an illustration. Malta's straight baseline system as presented in her Memorial was applied by virtue of the 1971 Act; straight baselines link 26 basepoints and enclose as internal waters the waters lying between the islands of Malta, Comino and Gozo. *Malta-Libya case*, Pleadings, Malta's Memorial, p. 414. It is not clear on which ground Malta has applied the baseline system around its archipelago as she cannot apply the archipelagic regime as prescribed in the LOSC because the water-to-land ratio does not satisfy the 1:1

excluded the small islet of Filfla as a basepoint for the maritime delimitation,[89] despite the fact that this islet was included in the straight baseline system applied by Malta.

The application of article 7 to groups of islands will inevitably meet difficulties in practice due to the geographic particularities of dependent midocean archipelagos as well as due to the fact that this article was not drafted or intended to cover cases like archipelagos. Whether article 7 will be applied depends primarily on geographical considerations and thus, not all archipelagos, due to the variety of geographical forms they take, will qualify for such application. What is more, such application will require in most cases a flexible and rather lenient interpretation of the conditions of article 7 appropriately adjusted to the particular geographic realities of archipelagos.

The imprecise terms used in article 7 create implications for its interpretation.[90] Various authors and the UN have interpreted the provisions of this article in a rather 'strict' way ensuring that the geographic particularities of an exceptional coast[91] justifying the application of a special system of baselines, are present.[92] On the contrary, most states have been quite liberal in their interpretation of the conditions

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condition of article 47 (1) of the LOSC (the water-to-land ratio of Malta is 0.64:1; see B.Kwiatkowska (2002), p. 37. Libya, on the other hand, expressed its surprise concerning the straight baseline system applied by Malta as she contended that it was not published or communicated to Libya as Malta had stated; Counter-Memorial of Libya, p. 15.

[89] *Ibid*, p. 48, para. 64, p. 50, para. 68, p. 57 para. 79 C; see also the dissenting opinions of Judges Oda (p. 139, 169) and Schwebel (p. 179) who do not express any opinion with regard to the application of the straight baseline system but agree with the exclusion of the islet of Filfla as basepoint for delimitation reasons.

[90] R.R.Churchill and A.V.Lowe (1999), p. 39. J.R.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), p. 317. The UN presents its guidelines as reasonable suggestions pointing out at the same time that it is possible to have different views on the subject; UN Office for Ocean Affairs and the Law of the Sea, *Baselines: An examination of the Relevant Provisions of the UN Convention on the Law of the Sea* (New York: UN Publications, 1989), p. 17.

[91] Article 7 has its origins in the 1951 *Fisheries case* where the ICJ proclaimed the validity of a system of straight baselines applied by Norway in its peculiar coasts (see J.R.V.Prescott, in E.D.Brown & R.R.Churchill (eds) (1987), p. 289; see also Chapter 1, p. 21-23). However, the section of this article referring to a 'fringe of islands along the coast' did not derive directly from the *Fisheries case* (M.W.Reisman & G.S.Westerman (1992), p. 82), which treated the issue of a coast 'bordered by an archipelago such as the skjaergaard'. *Fisheries case*, ICJ Rep. 1951, p. 129). In this context, the Norwegian baselines can provide a useful guide but the unique characteristics met in the Norwegian coast should not lead to a strict interpretation of article 7 of the Convention.; P.B.Beazley (1987), p. 13. Similarly, Limits in the Seas, No. 106 Developing Standard Guidelines for Evaluating Straight Baselines (hereafter referred to as *US Department of State Guidelines on Straight Baselines*), p. 28, 31.

[92] However, the UN in its guidelines has acknowledged that there is no 'uniformly identifiable objective test which will identify for everyone islands which constitute a fringe in the immediate vicinity of the coast' but urges states to be guided by the general spirit of article 7; *UN Office for Ocean Affairs and the Law of the Sea Examination of the Provisions on Baselines*, p. 20.

and the actual application of such a system in their coasts.[93] This liberal application of the rules of article 7 by states has been criticised by authors as inconsistent to the LOSC[94] but has attracted little attention by other states,[95] with the exception of the US, which has been consistent in its objections against straight baselines allegedly incompatible with article 7. [96]

Some guidance will be drawn from the analysis of this article by authors and from the way states have applied it in practice. However, these analyses referring to the issue of a mainland coast fringed with islands, will be necessarily adjusted to the geographical realities of outlying archipelagos with the view to demonstrating the potential ambit of the application of article 7 to groups of islands. In the following subsections the general conditions of article 7 will be examined with an emphasis on the implications of their application to dependent outlying archipelagos.

A. Conditions for the identification of groups of islands qualifying for the application of straight baselines (article 7 paragraph 1 of the LOSC).

According to article 7 (1) straight baselines may be applied in a coast where 'there is a fringe of islands along the coast in its immediate vicinity'. In the case of a group of island, this coast would be the coast of the relatively larger island of the group; for the application of this article the other islands of the archipelago or some of them should be considered to compose a fringe lying along the coast of the principal island and in its immediate vicinity. In the following subsections the main criteria as stipulated by article 7 (1) will be scrutinised and it will be showed how these criteria may be fulfilled in the case of groups of islands.

(i) The relevance of the size of the islands of the group

It was mentioned at the beginning of the present analysis that for article 7 to be applied in the case of groups of islands, there should be a relatively large island which

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[93] See *infra* regarding the interpretation of article 7 on the basis of subsequent practice, p. 99-101.
[94] See for example M.W.Reisman & G.S.Westerman (1992), p. 118 – 190. J.R.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), p. 297.
[95] Prescott points out that this failure of states to prevent this inconsistency has led to breaches of the rules of article 7 with the danger of rendering it a 'dead letter'; J.R.V.Prescott, in E.D.Brown & R.R.Churchill (eds) (1987), p. 317.
[96] See J.A.Roach & R.W.Smith (1996), p. 77-138. See also the publications of the US Department of State (Office of the Geographer, Bureau of Intelligence and Research) Limits in the Seas Series. However, straight baselines manifestly inconsistent to the LOSC have been objected by other states; for example France, Singapore and Thailand have protested against those of Vietnam.

will be fringed by the smaller islands of the group. The question, which arises, concerns the size of the principal island and particularly its relationship in size with the fringing islands. In cases where the principal island indeed dominates due to its size the archipelagic formation as is the case, for example, of the Furneaux archipelago (Australia), the Kerguelen Islands (France) or the Sjaelland Island (Denmark),[97] article 7 will be probably applied on a localised way in particular parts of the coasts of the main island. However, could article 7 be applied in groups of islands where the 'principal' island is only slightly larger than the other islands? Arguably, even in this case article 7 may be applied as long as the various other conditions of this article are met. Therefore, if the smaller islands of the archipelago may be considered as composing a fringe which masks sufficiently the coast of another *relatively* larger island, then straight baselines may be applied joining the fringe to the coast of the larger island.

This matter is also connected with the length of the coast of the main island. In the case of the application of article 7 in a *mainland* coast, the length of this coast has not been found to be relevant;[98] in the case of outlying archipelagos, however, the length of the coast of the main island may be relevant in the sense that it is hard to conceive that any islands would be found to fringe a relatively 'short' coast. However, this will also depend upon the size of the fringe and its relationship to the coast.

(ii) 'Fringe of islands' v. cluster of islands

The term 'fringe of islands' presupposes primarily that there is a close relationship between the islands composing this geographical feature. The exact distance between the islands is a disputable issue. However, most of the proposals refer to a maximum distance of 24 n.m., which actually reflects the distance in which the territorial seas of the islands overlap.[99] The overlapping of the territorial sea of

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[97] All these cases are examined in Chapter 3.

[98] It is the general direction of the coast that is relevant for the application of the system of straight baselines (article 7 (3) of the LOSC.

[99] See *US Department of State Guidelines on Straight Baselines*, p. 25; Beazley also suggests that 'where the territorial waters measured from the low-water line around individual islands spaced along the coast do not overlap, those islands are unlikely to constitute a fringe'. P.B.Beazley (1987), p. 14. Similarly, J.R.V.Prescott, in E.D.Brown & R.R.Churchill (eds) (1987), p. 295. On the contrary, Hodgson and Alexander pointed out that in the *Fisheries case* 'islands to be separated by narrow

the islands is a useful way to assess the compactness of the fringe particularly as this would lead to the internalisation of parts of the territorial sea without any – or with limited - encroachment upon the high seas. However, the geographical particularities of each case and specifically the relationship between the fringe and the coast should be factors taken into consideration when assessing whether the geographical feature composes a 'fringe'.[100]

Despite the limits set by international scholars with regard to the distances between the islands forming the fringe,[101] states have been much more liberal in their consideration of what constitutes a fringe of islands and have drawn straight baselines in coasts with a few offshore islands situated at long distances from each other, exceeding in many cases 50 n.m.[102] However, this practice has been criticised as inconsistent to the conditions prescribed in article 7.[103]

In the *Qatar-Bahrain case* the ICJ found that article 7 was inapplicable in a part of the coast allegedly fringed by islands. In this case, Bahrain had actually claimed archipelagic status and the right to draw archipelagic baselines on the basis of Part IV of the LOSC;[104] the Court rejected this claim but proceeded to examine whether Bahrain could apply straight baselines joining the islands in the south-eastern side of the archipelago to the coast of the main island. The Court emphasised the restrictive nature of the application of straight baselines by virtue of article 7 and stated that 'the maritime features east of Bahrain's main islands are part of the overall geographical

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channels must be closer to each other than 8 nautical miles.'; R.D.Hodgson & L.M.Alexander (1972), p. 34.

[100] J.R.V.Prescott (1987), p. 295.

[101] The UN in its guidelines does not specify any maximum distance between the islands composing the fringe.

[102] See for example the case of Vietnam which has applied a straight baseline system joining three islands with a distance of 161 n.m. between them to the mainland coast. Iceland has also applied straight baselines joining two islands situated 71 n.m. apart with the mainland coast; J.R.V.Prescott, in E.D.Brown & R.R.Churchill (eds) (1987), p. 297. See also M.W.Reisman & G.S.Westerman (1992) criticising on the same basis the cases of France and Guinea, p. 129, 131. Other similar cases include Italy, Iran and Thailand. Hodgson points out that 'the concept of fringing islands has been the factor most subject to abuse', R.D.Hodgson, 'Islands, Normal and Special Circumstances', Department of State Research Study (1973), p. 23. It could be suggested that this state practice has led to an original re-interpretation of article 7 of the LOSC regarding the existence of a fringe of islands even in a case of a few outlying islands; see *infra* on the interpretation of article 7 on the basis of subsequent state practice, p. 99-101.

[103] M.W.Reisman & G.S.Westerman (1992), p. 129, 131. J.R.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), p. 295. However Prescott suggests that if such practice receives general acceptance the 'word fringe in article 7 will become redundant', *ibid*, p. 298.

[104] See *Qatar-Bahrain case*, Pleadings, Bahrain's Memorial, p. 287-296; see also Map 12 in Vol. VII for an illustration of the archipelagic baselines as claimed by Bahrain.

configuration; it would be going too far, however to qualify them as a fringe of islands along the coast. The islands concerned are relatively small in number. Moreover, in the present case it is only possible to speak of a 'cluster of islands' or an 'island system' if Bahrain's main islands are included in that concept'.[105] An example accepted as compatible with the application of article 7 of the LOSC by the Arbitral Tribunal concerned the Dahlak archipelago fringing the coast of Eritrea; indeed in that case the archipelago was described as a 'tightly knit group' or 'carpet of islands and islets' that formed 'an integral part of the general coastal configuration' with the baseline 'found somewhere at the external fringe of the island system'.[106] In most of the cases, however, international adjudication tribunals or the ICJ have restrained from making any pronouncements regarding the compatibility of the application of straight baselines but have either ignored the baseline system[107] or disallowed specific basepoints.[108]

(iii) Number of islands composing the 'fringe'

The number of islands composing the fringe is also a complicating factor. In fact, article 7 does not determine this number but the essence of the word 'fringe' presupposes that there should be a number of islands and not just one.[109] Prescott points out that it would be open to countries to stick to the letter of the Convention and insist that two islands can form a fringe.[110] Reisman and Westerman point out

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[105] *Qatar/Bahrain case,*, para. 214. The archipelago at the south-western side of the main island was described by Bahrain as following: 'the maritime features whose geographical unity with the remainder of the Bahrain archipelago are of most direct concern to a maritime boundary delimitation with Qatar are the islands of the Hawar group, and Fasht ad Dibal. Rayad al Gharbihyah, the northernmost island of the Hawar group, is situated only 11 nautical miles from the southern tip of Bahrain's main island at Ra's al Barr. The intervening waters contain several other islands (Halat Noon, Qasar Noon, Jazirat Mashtan and Al Mu'tarid) distributed evenly between the main Bahrain island and the Hawar group. The intervening waters are moreover very shallow; the depth rarely exceeds 9 metres and is mostly less than 6 metres. Large areas are so shallow as to be quite unnavigable. Proximity and shallowness of depth, along with the intense patterns of social exchange described above, reinforce the geographical unity which exists between the Hawar group and the remainder of the Bahrain archipelago'. Pleadings, Bahrain's Memorial, p. 290-1.

[106] *Eritrea-Yemen Arbitration Award*, Phase II – Maritime Delimitation, para. 139. The award may be found at www.pca-cpa.org.

[107] *Libya/Malta case,* p. 48, para. 64, p. 50, para. 68, p. 57 para. 79 C

[108] *Eritrea-Yemen Arbitration Award* , paras. 143-145.

[109] The Office for Ocean Affairs and the Law of the Sea in its publication regarding baselines states that 'clearly there must be more than one island in the fringe but it is difficult to specify on any particular minimum number'; *UN Office for Ocean Affairs and the Law of the Sea Examination of the Provisions on Baselines,* p. 20.

[110] J.R.V.Prescott, in E.D.Brown & R.R.Churchill (eds) (1987), p. 294.

that taking into account the origin of the regime, that is the Norwegian skjaergaard, 'the quantitative test for the number of islands here should be very high'[111]. On the other hand, Beazley points out the 'exact number of islands will depend partially on size; three large islands might constitute a fringe where three islets over the same area would not'.[112]

Indeed, the number of the islands should depend upon the particularities of the area in combination with other conditions of the application of the system of straight baselines. For example, in the case of a relatively small coast, a fringe of two or three islands could be considered as fringing sufficiently the coast.

In the hypothetical example shown in figure 1, island (A) can be regarded as the main island with islands (B), (C), (D) and (E) fringing the northern coast of the island. Indeed, there is a fringe of islands in the immediate vicinity of the northern and east coast of island (A) masking the coast of the main island in a satisfactory way and therefore the state to which these islands belong can draw straight baselines joining the northern coast of island (A) with the outermost points of the fringing islands. On the contrary, the baselines drawn in the southern coast of island (A) joining this island with island (F) cannot be regarded as compatible with article 7 for the reason that there is not a fringe of islands but a sole island in the immediate vicinity of the southern coast of the principal island.

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[111] M.W.Reisman & G.S.Westerman (1992), p. 86.
[112] P.B.Beazley (1987), p. 13.

It should be pointed out that the applicability of article 10 to groups of islands is limited. The application of this article may reflect the archipelagic concept when the case concerns a two-island group (as in the Figure 4 above) but in broader groups of islands it can only justify the drawing of closing lines in specific parts of the archipelago (see the case of Sjaelland).

It should be lastly noted that the conditions of article 10 concerning the semi-circle test and the length of the baselines should be fulfilled.[193] According to the semi-circle test (article 10 (2)) the area of the indentation must be 'as large as, or larger than that of the semi-circle whose diameter is a line drawn across the mouth of that indentation'.[194] The existence of the second narrow passage should not affect the performance of the semi-circle test. [195] However, in the case indicated by Beazley where the bay created by an island located close to a mainland coast will have two mouths, the semi-circle test should be applied as follows: the total area of water enclosed should be 'in excess of the sum of the area of the two semi-circles that could be constructed on the two lines joining the natural entrance points'.[196]

The second criterion concerns the maximum length of the closing line, which according to article 10 of the LOSC should not exceed 24 n.m..[197] Since as mentioned above there will be two closing lines in the case of a bay created by islands, it is disputed whether 24 n.m. should refer to the aggregation of the closing lines or to the closing line drawn in the mouth of the bay. The US argued in the *US v. Louisiana* case that the distance from the island to the mainland should be added to the distance of the mouth of the bay in order to determine the 24 n.m. maximum length of the closing line.[198] The Court rejected this argument stressing that there is no actual

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[193] Article 10 (2), (3) of the LOSC.

[194] Article 10 (3) continues 'for the purpose of measurement, the area of an indentation is that lying between the low-water mark around the shore of the indentation and a line joining the low-water mark of its natural entrance points'; For the difficulties arisen in determining the natural entrance points of bays for the measurement of the semi-circle test see G.S.Westerman (1987), p. 98 *et seq.*.

[195] Islands lying either within the bay created by the islands or in the mouth of bay' would have the same treatment with regard to the calculation of the semi-circle test as in the case of bays; article 10 (3) LOSC.

[196] P.B.Beazley (1987), p. 24.

[197] It should be pointed out though that it is not necessary that these two lines coincide; article 10 (5) of the LOSC prescribes that 'where the distance between the low-water marks of the natural entrance points of a bay exceeds 24 n.m., a straight baseline of 24 n.m. shall be drawn within the bay in such a manner as to enclose the maximum area of water that is possible with a line of that length'.

[198] *US v. Louisiana case,* 394 *U.S.*, p. 63, fnt 83.

'mouth between the island and the mainland'.[199] Indeed, the distance between the islands does not represent the mouth of the bay and thus should not be counted in the length of the closing line in the mouth of the bay.

The length of the 'second' closing line actually reflects the distance between the islands. As argued above, this opening to the sea should be relatively narrow so as to reflect the fact that the islands may be considered as forming an integral part. Further criteria have been suggested by authors for the determination of the conditions on the basis of which such system may be applied, referring particularly to the relation between the island and the mainland coast. These additional criteria purport to ensure that the island is located in such a close proximity to the coast so as to be considered as an integral part of it. Most of the additional criteria suggested refer to the size of the island,[200] its shape and its relation to the configuration of the coast, the distance between the island and the coast[201] and the depth and utility of the intervening waters.[202] The characteristics of the islands in terms of size or shape would not add anything that could not be determined by the use of the semi-circle test of article 10.[203] The passage between the island and the mainland coast (in the case of groups of islands between the islands) is certainly relevant but it would be hard to envisage a mathematical criterion referring to its width or length which could be generally applicable. It is true that this passage should be narrow so as to give the impression of a continuance of the land between the two islands. Each case should be examined on its own terms but it could be said that the main objective should be, as suggested by

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[199] *Ibid.*

[200] The first test Beazley suggests necessitates that 'the area enclosed between perpendiculars dropped from the extremities of the island to the mainland be less than the area of the island'; *supra* note 79, p. 24. Similarly, Hodgson and Alexander suggest that there should be a link between the area of the island and the area of water enclosed with the former exceeding in area the latter. R.D.Hodgson & L.M.Alexander (1972), p. 17. Westerman (1987) rejects this criterion as arbitrary, p. 145.

[201] With regard to the channel created by the island and the mainland coast, it is suggested that the length of the channel should be proportionate to its average width. Beazley suggests that there should be a relationship between the length of the channel and the length of the two perpendiculars as these were defined above (*supra* note 200) ; particularly, according to this suggestion, the ratio of the length of the channel to the average length of the two perpendiculars (reflecting actually the width of the channel) should be greater than 3:1 or more realistically 4:1: P.B.Beazley (1987), p. 24; Hodgson and Alexander suggested a ratio of 3:1 representing the length of the channel created between the island and the mainland coast to the average of the closing lines; R.D.Hodgson & L.M.Alexander (1972), p. 17, 20.

[202] These criteria were suggested as illustrative and not exhaustive by the US Supreme Court in the *US v. Louisiana case,* 394 *U.S.*, p. 66 the Court referred to these criteria without prescribing any precise conditions on how these criteria should be met.

[203] See G.S.Westerman (1987), p. 156-159.

Westerman, to ensure that the spirit of article 10 is maintained in the sense that the waters of the indentation are so closely related to the land domain ('land-locked') to be considered as part of the internal waters of the state.[204]

According to article 10 (4) of the LOSC the waters of the bay enclosed by the closing line will have the status of internal waters; in contrast to article 8 (2) referring to straight baselines in coasts deeply indented and cut into or fringed by islands, there is no innocent passage in the waters of the bays. Hodgson and Alexander stress that the channel enclosed by the baselines should not be a principal route for navigation so as to be subject to the regime of internal waters.[205] This would also reflect the basic concept of the application of closing lines to bays, namely the sufficient enclosure of the waters of the bay from the land domain ('land-locked waters').[206]

The applicability of article 10 to groups of islands is limited and this article cannot obviously substitute the absence of a special baseline system for dependent outlying archipelagos.

2.4 CONCLUSION

The present chapter examined the possibilities arising from the LOSC as potential substitutes for the lack of a special regime for dependent outlying archipelagos. The first possibility which was examined in the present chapter concerned the satisfaction of the archipelagic concept in terms of needs and interests by the zones of functional jurisdiction recognised by the LOSC. This alternative is based on an argument raised during UNCLOS III that the archipelagic regime is practically redundant because of the adoption of the EEZ. However, a multi-zone regime was found to be inadequate to address satisfactorily the needs and interests of archipelagos, which are better safeguarded in archipelagic waters. The archipelagic regime unifies the waters of the archipelago in a sovereignty regime giving archipelagic states more extended competences and jurisdiction than the zones of coastal jurisdiction prescribed by the LOSC. It was noted that indeed states have showed a tendency to expand their jurisdiction and competence in the EEZ in various respects concerning the protection of the environment, navigation, and security

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[204] *Ibid*, p. 158.
[205] R.D.Hodgson & L.M.Alexander (1972), p. 17.
[206] G.S.Westerman (1987), p. 146.

considerations. However, this practice of states, resisted by other states, accentuates the problems created in a functional zone, such as the EEZ, particularly concerning the performance of conflicting rights.

The second possibility which was examined concerned the application of straight baselines to groups of islands on the basis of article 7 (coasts fringed with islands) and article 10 (bays). Article 10 on bay closing lines was found to have only limited relevance to groups of islands. Bay closing lines may be drawn in cases where the islands are related in such a way so as to form a juridical bay satisfying the conditions stipulated in article 10. Article 7 of the LOSC was found to be applicable either on a localised basis in parts of an archipelago or in groups where the coast of a relatively large island is fringed by the other smaller islands of the group. Provided that the general conditions of this article are met, the continental state, in whose possession the archipelago lies, may apply a system of straight baselines around the whole archipelago or in parts of it for the delimitation of its territorial sea.

Nevertheless, the application of straight baselines as prescribed in article 7 of the LOSC is not free of implications. The validity of the application of article 7 in the case of dependent midocean archipelagos is a matter of interpretation of the conditions stipulated in this article and it is further complicated by the variety of geographical particularities of each group of islands. The flexibility of these rules initially drafted to regulate the measurement of the territorial sea of a coast fringed with islands resembling the Norwegian model and now called upon to regulate the case of a group of islands is also problematic. An original and 'loose' interpretation of these conditions is required, which might be a matter of controversy among states creating instability in the measurement of the maritime zones of an archipelago.

However, it should be noted that the application of straight baselines is more advantageous for archipelagos than the application of the archipelagic regime since in the former case the enclosed waters have the status of internal waters, where the state exercises full sovereignty subject solely to the right of innocent passage attributed to third states' vessels.

To sum up, the provisions of the LOSC are of limited applicability in the case of dependent outlying archipelagos. In the following Chapter, the ambit and scope of such application will be assessed in practice through the examination of the straight baseline systems applied by continental states in their outlying archipelagos.

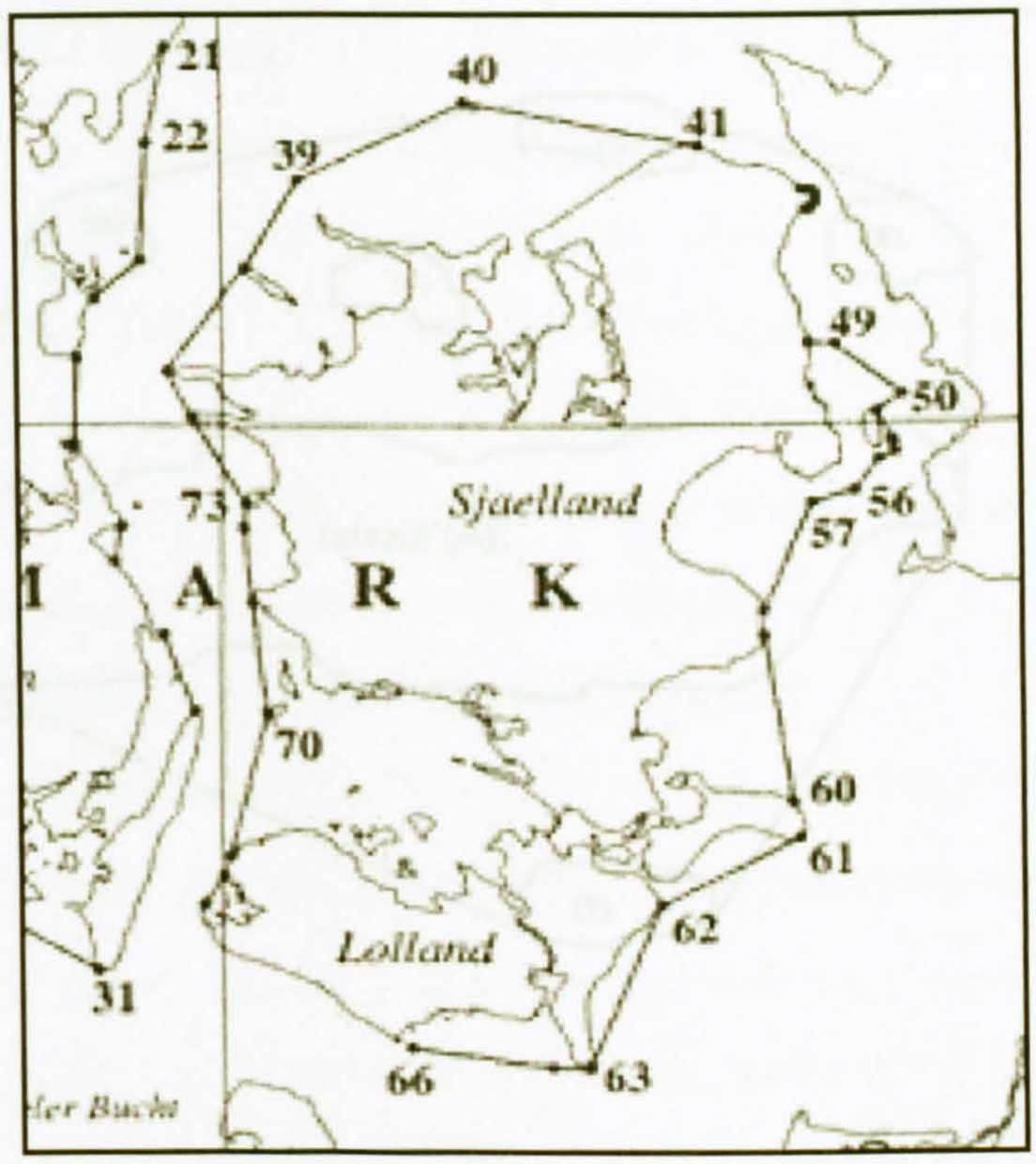

Figure 5

Source: Detail from map found at Law of the Sea Bulletin, No. 53, Division for Ocean Affairs and the Law of the Sea, (Office of Legal Affairs, N.York, 2004), p. 44

On the contrary, despite the fact that the location of the islands of Formentera and Ibiza in the Balearic Islands and particularly the existence of small islands in between them gives the impression of the creation of two bays in the eastern and western parts of the group (see Figure 6), article 10 is inapplicable as the semi-circle test cannot be satisfied.[192]

Figure 6

Source: http://www.map-of-spain.co.uk/balearic_islands_maps.htm

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[192] As will be analysed in Chapter 3, Spain has applied a straight baseline system joining these two islands together. Three further instances of state practice (Guadeloupe, Kerguelen Islands, Falkland Islands) where article 10 could potentially be applied are discussed in Chapter 3.

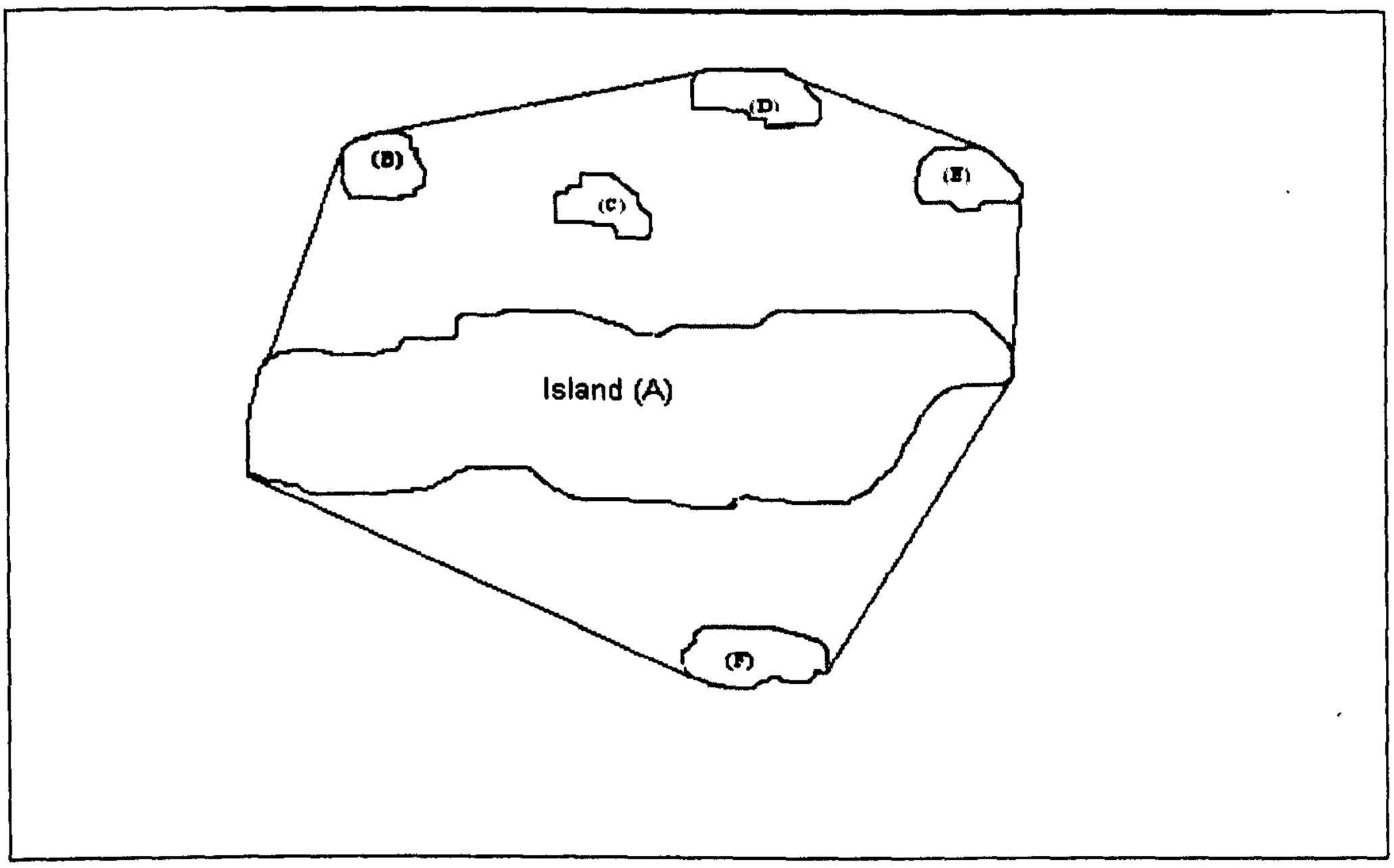

Figure 1

Application of article 7 of the LOSC to a hypothetical group of islands

(iv) The issue of rocks as defined in article 121 (3) of the LOSC

There is also the question of whether rocks as defined in article 121 (3) are included within the meaning of islands fringing the coast. Article 121 (3) reads as following: 'rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'. This consideration applies only within the framework of the 1982 Convention on the Law of the Sea, as there was no distinction among the different categories of islands in the 1958 Geneva Convention on the Territorial Sea[113] while it is disputed whether article 121 (3) forms part of customary international law.[114]

Reisman and Westerman seem to suggest that while rocks can be used as basepoints for the drawing of straight baselines,[115] they cannot be decisive for the

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[113] In the TSC, article 10 provides that an island is 'a naturally-formed area of land surrounded by water which is above water at high tide'. In the 1958 Geneva Convention on the Continental Shelf the term 'island' was not defined.

[114] Charney suggests that this provision forms part of general customary law J.I.Charney, *supra* note 22, p. 871- 873 while the following authors reject such contention: R.R.Churchill & A.V.Lowe (1999), p. 164; see also B.Kwiatowska & A.H.A.Soons (1990), p. 174-181.

[115] M.W.Reisman & G.S.Westerman (1992), p. 86. Similarly, R.Lavalle (2004), p. 54.

identification of the existence of a fringe of islands along the coast.[116] It is certain that rocks can be used as basepoints[117] as according to paragraph 4 of article 7 low-tide elevations (LTEs) may be used as basepoints provided that they have a permanent installation built upon them.[118] The provision of this article stemmed from the concern of the ILC to create visible at all times for the mariners points of departure for baselines.[119] Therefore, rocks are suitable as basepoints for the drawing of straight baselines as they are areas of land above water at high tide.

However, the differentiation between islands and rocks for the identification of a coast suitable for the application of a system of straight baselines is unjustifiable. The Court in the *Fisheries case* described the Norwegian coast as following: 'to the west, the land configuration stretches out into the sea: the large and small islands, mountainous in character, the islets, rocks and reefs, some always above water, other emerging only at low-tide, are in truth but an extension of the Norwegian mainland'.[120] Therefore, the Court considered that the islands, islets, rocks and reefs created a compact whole, the 'skjaergaard' archipelago which fringed the Norwegian coast.

Therefore, as long as rocks can be used as basepoints for the drawing of straight baselines, there is no reason why they should not be taken into account for the examination of the conditions regarding the existence of a fringe of islands. Thus, the group of islands fringing the coast can entail apart from islands, other islets and even rocks within the meaning of article 121 (3).[121] It is the existence of all these geographical features that gives the impression of a compact whole.[122]

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[116] *Ibid,* p. 85; Reisman and Westerman state that 'under the 1982 Convention, the islands that constitute the fringe in the alternative preliminary geographical test for straight baselines must be able to sustain human habitation or economic life of their own'. The same view is shared by R.Lavalle (2004), p. 53-4.

[117] R.R.Churchill & A.V.Lowe (1999), p. 50. These authors point out the anomalous effect created by articles 121 (3) and (13) with regard to the fact that a low-tide elevation can sometimes generate an exclusive economic zone, whereas an uninhabitable rock cannot, even though the latter will usually be a much more visible manifestation of land. See *infra* note 125 with regard to the use of rocks as basepoints and the potential conflict with article 121 (3) of the LOSC.

[118] Article 7 (4) further provides that LTEs which have received general international recognition may also be used as basepoints for the drawing of straight baselines.

[119] See *ILCYB* 1953 Vol. II (New York: UN Publ., 1959), p. 78.

[120] *Fisheries case,* p. 127.

[121] See H.W.Jayawardene (1990), p. 65; he refers to the case of the islands constituting a promontory stating that the 'extension of the mainland is represented in many cases by a coastal archipelago consisting of islets, skerries and rocks as well as islands'. Lavalle, however, argues that 'the rocks should, at least in certain cases, not considerably outnumber the regular islands' pointing out that in the

However, it is questionable whether article 7 is applicable in the case where the fringe is composed solely by rocks. Reisman and Westerman argue that the phrase 'fringe of islands' should be interpreted in the light of article 121 (3) which was an innovation of the LOSC in comparison to the regime governing islands before UNCLOS III and therefore, a 'fringe of rocks' would not qualify for the application of article 7.[123] However, it should be observed that the provision of article 7 of the LOSC was 'transferred' *verbatim* from the 1958 TSC, which did not entail any classification of islands. It should also be pointed out that there was no discussion during UNCLOS III with regard to a change in the perception of article 7 in the way it was normally applied on the basis of the TSC.[124] Furthermore, the *ratio* of article 121 (3) was to prohibit the generation of an EEZ and continental shelf for rocks which cannot sustain human habitation or economic life of their own autonomously but no such connection was suggested for the application of article 7 in the case where rocks compose a compact whole along the coast. In this sense, we should differentiate between the capacity of a geographical feature to generate maritime zones and its capacity to be used as part of the baseline system; [125] in the latter case, it is not the

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contrary case the second requirements of article 7 (3) of the LOSC would not be met; R.Lavalle (2004), p. 54. He does not however explain why the presence of rocks cannot be deemed to enclose sufficiently the waters inside the straight baseline system.

[122] Alexander seems to agree that rocks can form a fringe where straight baselines may be applied by virtue of article 7 of the LOSC; L.M.Alexander, Discussion, South Korea's Baseline Claims in J.M.Van Dyke, L.M.Alexander & J.R.Morgan (eds) (1988), p. 189.

[123] M.W.Reisman & G.S.Westerman (1992), p. 84-6; they argue that as long as the interpretation of international treaties has to take account of the entire text, islands should be determined on the basis of article 121 (3) of the LOSC.

[124] M.Voelckel, 'Les lignes de Base dans la Convention de Genève sur la Mer Territorial', 19 *AFDI* (1973), p. 820.

[125] A similar question concerns whether article 121 (3) rocks, which are located within the territorial sea of a mainland coast ('proximate' rocks) will be used as basepoints for the measurement of (all) maritime zones. Article 13 (1) gives this right to 'proximate' LTEs. Thus, while proximate LTEs, which are inferior geographical features to rocks, will be used for the measurement of all maritime zones, rocks cannot, according to article 121 (3), generate an EEZ/CS. This inconsistency stems from the fact that the provisions of Section 2 of the LOSC were transferred verbatim from Section 2 (article 11) of the TSC which contained no provision differentiating islands from rocks and which admittedly did not provide for an EEZ. It is not clear how this inconsistency has been treated in state practice and it has drawn limited attention by authors who have however advanced conflicting solutions: Lavalle, for example, argues that neither proximate LTEs nor proximate rocks will generate an EEZ/CS; he argues that 'from the conclusion that article 121 (3) applies to proximate rocks, it follows by a reverse a fortiori argument that proximate elevations may not generate EEZ and continental shelf areas' (R.Lavalle (2004), p. 63). This solution is however incompatible with the LOSC which specifically provides that all maritime zones will be measured from the baselines as prescribed in Section 2 (including article 13) of the Convention. It appears more compatible with the spirit of the LOSC, as argued by Soons and Kwiatkowska, that proximate rocks will by analogy to LTEs be used as basepoints for the measurement of EEZ/CS; A.Soons & B.Kwiatkowska (1990), p. 146-148.

geographical feature itself which generates the maritime zones (admittedly the effect in practice will be the same) but the closely located mainland coast. Therefore, there is no conflict between Section 2 of the LOSC and article 121 (3) as they both regulate different issues.

Therefore, on the basis of these observations, the term 'islands' in the phrase 'fringe of islands' should be interpreted broadly than article 121 (3) and, therefore, even a 'fringe of rocks' would qualify for the application of article 7.

(v) The relationship between the coast and the fringing islands

Article 7 refers to a mainland coast which should have the characteristics required by this article in order to qualify for the application of straight baselines. In the present analysis, the term 'coast' would refer to the coast of an island, which due to its size is considered as dominating the archipelagic formation. The assessment of the fulfilment of the conditions set out in article 7 would necessarily concern a localised examination of a group of islands referring to islands fringing any of the coasts of the principal island.

(a) The fringe of islands should be 'along the coast'

This phrase denotes that the fringing islands should be situated in a parallel way to the coast rather than 'at an acute angle'.[126] The Office for Ocean Affairs has also concluded that this provision does not 'apply to islands arranged like stepping-stones perpendicular to the coast'.[127] This requirement is also connected with the condition stipulated in paragraph 3 of article 7 referring to the general direction of the coast which is discussed below.[128]

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[126] M.W.*Reisman & G.S.Westerman (1994)*, p. 88. The US Department of State refers to this case as the 'directional trend' between the coast and the islands and concludes that the 'maximum permissible deviation' of the fringe of islands from the general direction of the coast should be 20 degrees. The deviation will not be examined in accordance with one or two islands but in accordance with the general configuration of the group of fringing islands and its connection to the coast. *US Department of State Guidelines on Straight Baselines*, p. 19-10, 20-1.

[127] *UN Office for Ocean Affairs and the Law of the Sea Examination of the Provisions on Baselines*, p. 20.

[128] See *infra* p. 106.

(b) The fringe of islands should be in the immediate vicinity of the coast

The fringe of islands should have a direct relationship or connection to the coast and be at a close distance from it.[129] However, there is no agreement regarding the maximum allowable distance for the examination of whether a fringe of islands is located in the immediate vicinity of the coast,[130] with suggestions varying from 12[131] to 48 n.m..[132] The distance between the island and the coast should be measured from the landward side of the island, so as to include cases where the fringing island is wide but at the same time is satisfactorily close to the mainland.[133] In the case of a cluster of islands - and not of a chain of islands[134] - the important distance for the qualification of the fringe as located in the immediate vicinity of the coast, will be the one between the island closest to the coast and the coast itself and not between the coast and the island located farthest away from it.[135]

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[129] See M.W.Reisman & G.S.Westerman (1992), p. 89. Prescott in his analysis of this phrase suggests that both words are important; 'vicinity suggests the neighbourhood and immediate indicates a restriction of that area', J.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), p. 299.

[130] See J.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), p. 299; M.W.Reisman & G.S.Westerman (1992), p. 89. The UN Office for Ocean Affairs and the Law of the Sea has stated that the phrase 'in its immediate vicinity' is a concept which has a clear meaning but for which there is no absolute test; *UN Office for Ocean Affairs and the Law of the Sea Examination of the Provisions on Baselines*, p. 21. The US State Department has also stated that this criterion may be in part subjective; *US Department of State Guidelines on Straight Baselines*, p. 21.

[131] M.W.Reisman & G.S.Westerman (1992), p. 89-90; they assert that their suggestion for 12 nautical miles 'is justified by the etymology of the word 'vicinity' by its qualification 'immediate' and by the subsequent judicial development of the institution of island enclaves'.

[132] The US State Department justifies its selection for a 48-mile limit in a strange way by stating that this is the double of the total of the breadth of the territorial sea of the coast and the islands; *US Department of State Guidelines on Straight Baselines*, p. 22. Munavvar suggests that this selection appears arbitrary and that the justification put forward does not reflect the relationship between the island group and the mainland; M.Munavvar (1995), p. 121. Bernhardt, however, explains that the suggestion of the US Department of State for a distance of 48 miles between the islands and the coast represents the overlapping of the contiguous zones and he also points out that in the *Fisheries case* no such distance exceeded 48 n.m.: J.P.A.Bernhardt in J.M.Van Dyke, L.M.Alexander & J.R.Morgan (eds) (1988), p. 95. The Office for Ocean Affairs recognises the distance of 48 n.m. as proposed in the literature, but concludes that a distance of 24 miles would more appropriately satisfy the conditions; *UN Office for Ocean Affairs and the Law of the Sea Examination of the Provisions on Baselines*, p. 21.

[133] J.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), p. 299.

[134] The geographical feature of a cluster of islands refers to the case of a coastal archipelago such as the Aaland Islands of Finland, whereas a chain of islands corresponds to a group of islands situated in a linear position along the coast like the islands fringing the Dutch coast in the North Sea, See M.W.Reisman & G.S.Westerman (1992), p. 107-111 & 116 respectively.

[135] *UN Office for Ocean Affairs and the Law of the Sea Examination of the Provisions on Baselines*, p. 21. Still there should be a connection between the outermost islands of the group and the coast as there is also the issue of the fringe respecting the general direction of the coast; see *infra* p. 95.

Again, states have not abided by the 'strict' interpretation suggested by authors or the UN of the term 'in the immediate vicinity' and have drawn straight baselines joining islands which are situated in distances exceeding 24 n.m. from the shore.[136]

The distance of the fringe of islands from the coast should be examined in relation to the general geographical particularities of the area.[137] In the particular case of the application of article 7 to groups of islands, the distance between the fringing islands and the coast should depend upon the sizes of the above features and particularly the length of their coastlines. Thus, in the case of very small features, where a distance of 24 n.m. is disproportionate to their coastlines, the condition of the immediate adjacency of the coast will not be met.

(c) The 'masking' of the coast and the relevance of its length

A last consideration regarding the qualification of a coast as fringed by islands would be the 'masking of the mainland coast'. This criterion necessitates that there should be a relationship between the landmass of the mainland, in the case discussed of the coast of the principal island, and that of the fringing islands. This means that the fringe of islands should 'mask', that is, should 'cover' the coast in such a way as to be considered as its seaward extension.[138] The requirement for the masking of the coast derives its notion from the factual realities of the Norwegian coast in the *Fisheries case* where the skjaergaard archipelago masked nearly two-thirds of the length of the coastline[139] creating the impression that the end of the coast was on the islands.[140]

With regard to groups of islands, the masking of the coast of the principal island by the fringing islands would depend primarily upon the geographic particularities of the group and specifically the compactness of the 'fringe' and the length of the island coast. In the case where the principal island is not much larger than the fringing ones,

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[136] See for example the cases of Italy, Thailand and Vietnam; J.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), p. 299.
[137] See H.W.Jayawardene (1990), p. 64.
[138] *US Department of State Guidelines on Straight Baselines*, p. 26.
[139] R.D.Hodgson (1973), p. 23.
[140] J.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), p. 295. See also the suggestions by the UN Office *for Ocean Affairs and the Law of the Sea Examination of the Provisions on Baselines*, p. 20. Lastly, the US State Department suggests a figure of 50% for the ratio between the island-to-coast land mass. It has also suggested a specific way according to which this masking percentage can be determined; see *US Department of State Guidelines on Straight Baselines*, p. 28-30

it is likely that the criterion of the 'masking of the mainland coast' will be easily met by a fringe of a few islands. However, this will depend upon the distance between the islands of the fringe and their connection to the coast. In the case where the principal island is much bigger than the fringing islands as is the case of the Svalbard archipelago or the Sjaelland Island, the masking criterion should be examined with regard to each part of the coast of the principal island.

B. Conditions regarding the application of the straight baselines system *per se*

When the conditions of paragraph 1 of article 7 regarding the identification of the coast qualifying for a system of straight baselines have been met and the state can proceed with the drawing of straight baselines, the following conditions should be fulfilled.

According to paragraph 1 of article 7 the straight baselines should connect appropriate points. These points should be situated either on the mainland – in the case of a group of islands, the coast of the principal island - or the fringing islands should be located on or above the low-water mark used for normal baselines by virtue of article 5.[141]

Furthermore, according to paragraph 3 'the drawing of straight baselines must not depart to any appreciable extent from the general direction of the coast and the sea areas lying within the lines must be sufficiently closely linked to the land domain to be subject to the regime of internal waters'.

It is difficult to determine exactly the general direction of the coast. Several perspectives are possible such as the alignment of the coast as a whole or of an appreciable part of it.[142] The scale of the map employed should also be taken into account in assessing the compatibility of the straight baselines system applied in a specific case.[143] The ICJ in the *Fisheries case* noted that the condition concerning the general direction of the coast is devoid of any mathematical precision.[144]

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[141] J.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), p. 299.
[142] H.W.Jayawardene (1990), p. 56.
[143] G.Francalanci & T.Scovazzi (eds), *Lines in the Sea* (Dordrecht: Martinus Nijhoff Publishers, 1994), p. 34. It has been argued that 'the general direction of the coast should be determined from small-scale maps and charts (1:1,000,000) and not from detailed and large-scale charts'; R.D.Hodgson & L.M.Alexander (1972), p. 37. They point out, though, that 'major deviations ie manifest abuses of the general direction of the coast must be dictated by the physical geography as determined through an examination of large-scale maps and charts', *ibid*, p. 39.
[144] *Fisheries case, ICJ Rep. 1951*, p. 142.

One of the aspects of the compatibility of the baselines to the general direction of the coast concerns the degree of deviation of the fringe of islands from the coast, as discussed above.[145] The configuration of the coast of the principal island of the group is the one that should be respected when drawing the straight baselines. However, in the case of a group of islands, one should also take into consideration the difficulty arisen by the fact that it is actually the outline of the fringing islands, which determines the configuration of the whole archipelago. Similar implications have been created by the application of article 47 (3) of the LOSC, where it is provided that the archipelagic baselines should not 'depart to any appreciable extent from the general configuration of the archipelago'. It has been argued that in this case it is the outline of the outermost islands of the archipelago that determines its configuration.[146]

With regard to the second section of paragraph 3, there is a requirement of a close linkage between the waters inside the baselines and the land domain. This reflects the dictum of the ICJ in the *Fisheries case*; specifically, the Court stated that 'the real question raised in the choice of baselines is in effect whether certain sea areas lying within these lines are sufficiently closely linked to the land domain to be subject to the regime of internal waters.[147] This presupposes a degree of enclosure of the intervening waters[148] denoting that the group of fringing islands should not be

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[145] See *supra* p. 93.

[146] Hodgson and Smith pointed out that this paragraph 'has little meaning and could be eliminated' as it is impossible to distinguish what the general configuration of the archipelago since the group of islands determines the general direction of the baselines and not the coast itself. R.D.Hodgson & R.W.Smith (1976), p. 243-4. See also H.W.Jayawardene (1990), p. 149-150; M.Munavvar (1995), p. 132; R.R.Churchill & A.V.Lowe (1999), p. 124. Kwiatkowska and Agoes contend that the conditions of article 47 (3) is of minor practical importance 'since this requirement is implicit in the basic rule of article 47 (1) that the baselines join the outermost points of the outermost islands and features comprising the archipelago'; B.Kwiatkowska & E.R.Agoes (1991), p. 37. The same argument has been used in cases of coastal archipelagos which spread seaward forming a kind of cap to the coast; the US State Department referring to the Aaland Islands stated 'the Finnish system nearly duplicates the configuration of the fringing islands'; this consideration is based on the fact that baselines segments are rather short with the longest not exceeding 8 n.m.; *Limits in the Seas No. 48 Straight Baselines: Finland* (Office of the Geographer, Bureau of Intelligence and Research, 1972), p. 4; the US State Department seems to be suggesting that as long as the other conditions of article 7 are met (existence of a fringe of islands along the coast) the use of short baselines will ensure that the general direction of the coast is respected.

[147] *Fisheries case, ICJ Rep. 1951*, p. 133.

[148] M.Munavvar (1995), p. 122.

located in a great distance from the coast and that the enclosed waters are sufficiently surrounded by land so as to justify their characterisation as internal waters.[149]

Despite the fact that none of the above provisions treats the issue of a maximum length for the baselines, commentators have included such a condition in their researches. The longest baseline drawn by Norway and accepted by the Court in the *Fisheries case* was 43.6 miles.[150] Hodgson and Alexander suggest a maximum length of 40 n.m. for a single straight baseline[151] while Beazley propose a maximum of 45 miles.[152] These numbers are mere suggestions as the LOSC does not provide for a mathematical formula for a maximum of straight baselines;[153] however, the conditions imposed by the general conditions set out above 'will be a restraining factor' regarding the use of exorbitantly long lines.[154] In practice states have exceeded the proposed by authors length for the segments of straight baselines but at the same time their practice has been criticised as being in breach of the rules of article 7.[155]

Paragraph 4 of article 7 provides that straight baselines cannot be drawn from LTEs, defined in article 13 as 'a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide', 'unless light-houses or similar installations which are permanently above sea level have been built on them

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[149] See also a statement of Sweden to the ILC stressing that the criterion of the sufficient link means that '... the expanse of water in question is so surrounded by land including islands along the coast that it seems natural to treat it as a part of the land domain'. *ILCYB* 1955, Vol. II (N.York: UN Publications, 1960), p. 54. Prescott suggests that there might be an exact percentage regarding the relationship between the waters inside the baselines and the mainland in the case of islands fringing the coast, but concludes that the requirements of article 7 (3) do not suggest any degree of mathematical exactitude; according to this provision, these conditions should be borne in mind as general guidelines when a state draws its straight baselines. J.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), p. 308.

[150] R.D.Hodgson & L.M.Alexander (1972), p. 44. Hodgson and Alexander point out that the longest geographic segment was 40.0 miles between basepoints 45-45, while the segment 20-21, which was 43.6 miles, enclosed historic waters and was not geographic in basis; see *ibid*, p. 42.

[151] *Ibid*, p. 42.

[152] P.B.Beazley (1987), p. 14. The US State Department suggest a 60-mile maximum length for a general direction line but has no suggestion with regard to a maximum single straight baseline, *US Department of State Guidelines on Straight Baselines*, p. 31.

[153] Francalanci and Scovazzi point out that the rule for respecting the general direction of the coast does not pose any restraint regarding any maximum permissible length for straight baselines. G.Francalanci & T.Scovazzi (eds) (1994), p. 34.

[154] R.R.Churchill & A.V.Lowe (1999), p. 37.

[155] For example, S.Korea and Mozambique have drawn straight baseline segments measuring around 60 n.m. in coasts fringed by islands. In cases where it is uncertain whether the baselines were drawn in a coast deeply indented and cut into or fringed with islands, some states have drawn baselines more than 100 n.m. in length, such as Ecuador (136 n.m.), Guinea (120 n.m.), Burma (222.3 n.m.); see J.R.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), table 3.2, p. 66.

or except in instances where the drawing of baselines to and from such elevations has received general international recognition'.[156]

Paragraph 5 of article 7 provides that 'where the method of straight baselines is applicable under paragraph 1 account may be taken in determining particular baselines of economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by long usage'. This provision is based on the ruling of the ICJ regarding the validity of the specific baselines drawn by Norway across the Lopphavet basin.[157] Economic considerations will be important in the case where a coast has already been considered to merit the application of a straight baseline system.[158] Local economic interests, like fishing, exploitation of the maritime natural resources, tourism, uses of the sea for communication purposes,[159] might allow the application of specific baselines, which would be 'illegitimate' under normal circumstances. For example, specific baselines could deviate from the general configuration of the coast to a greater extent than the international community would usually accept.[160]

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[156] Such installation could entail towers, which look like lighthouses or navigational aids like foghorns, radar reflectors and beacons; see J.R.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), p. 309; *UN Office for Ocean Affairs and the Law of the Sea Examination of the Provisions on Baselines*, p. 24. See also H.W.Jayawardene (1990), p. 68-74 for a discussion regarding the issue of low-tide elevations as basepoints for straight baselines. The condition concerning the international recognition of such LTEs reflects the Norwegian system of straight baselines, where the International Court of Justice accepted the use of some low-tide elevations as basepoints despite the fact that nothing was built on them. *Fisheries case, supra* note 91, p. 116. See *UN Office for Ocean Affairs and the Law of the Sea Examination of the Provisions on Baselines*, p. 24. See also R.Lavalle (2004), p. 50-51. Some states have also indicated in their legislation the use of low-tide elevations as basepoints for the drawing of straight baselines; see for example Saudi Arabia and Syria, *Limits in the seas* (US Department of State, Bureau of Ocean and International Environmental & Scientific Affairs) No 20 (1970) and 53 (1973) respectively.

[157] *Fisheries case,* p. 142. The Court stated commenting on the 43.6 line across the Lopphavet basin that 'the divergence between the baseline and the land formations is not such that it is a distortion of the general direction of the Norwegian coast'. It continued to state that this exception is justifiable under specific rights of the Norwegian government 'founded on the vital needs of the populations and attested by very ancient and peaceful usage'.

[158] See ILC, GA Off.Rec., 11th Session, Report of the ILC, Supplement No. 9 (A/3159) (N.York: UN Publications, 1956), p. 14: 'the application of the straight baseline system should be justified in principle on other grounds before purely local economic considerations could justify a particular way of drawing the lines'. J.R.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), p. 310; *UN Office for Ocean Affairs and the Law of the Sea Examination of the Provisions on Baselines*, p. 25. J.A.Roach & R.W.Smith (1996), p. 66.

[159] M.Munavvar (1995), p. 125.

[160] J.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), p. 310. See also G.Fitzmaurice (1959) who points out that '... the existence of these interests (economic) may justify a rather liberal interpretation of the conditions governing the method of drawing individual baselines', p. 77; See also P.B.Beazley (1987), p. 15; H.W.Jayawardene (1990), p. 59; T.Scovazzi (1990), p. 456.

This section is important for the case discussed; in the case of an archipelago, there is a strong economic interconnection between the different parts of the group of islands and a high degree of dependency of the people living in the islands upon the intervening waters. In fact, economic considerations regarding the need for the people living on the islands to exploit the resources of the intervening waters of the archipelago was one of the principal arguments of archipelagic states and states possessing archipelagos during UNCLOS III. These economic considerations could lead to a more generous interpretation of the conditions stipulated in the other paragraphs of article 7 with regard to the application of straight baselines in a group of islands.

Lastly, paragraph 6 of article 7 provides that 'the system of straight baselines may not be applied by a State in such a manner as to cut off the territorial sea of another State from the high seas or an exclusive economic zone'. The limitation stipulated by this provision is relevant in the case where a group of islands is located near the mainland of a foreign state - like the case of the Greek islands lying near the coast of Turkey[161] or the Australian Islands in the Torres Strait lying close to the coast of Papua New Guinea - or near other islands belonging to a third state.

C. Interpretation of the conditions posed by article 7 on the basis of subsequent state practice

It was pointed out above that states have been interpreting the various conditions prescribed by article 7 and particularly the determination of the existence of a 'fringe of islands' in a flexible and 'loose' way. For example, Oman,[162] Djibouti,[163] Honduras[164] and Thailand[165] have applied straight baseline systems in specific parts of their coasts joining solely a few outlying islands to the mainland. It seems that in most cases, states have re-interpreted the notion of 'fringe' so as to refer to what may be considered as a 'cluster' of islands. As mentioned above, a flexible

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[161] R.R.Churchill & A.V.Lowe (1999), p. 37.
[162] See US Department of States, Bureau of Oceans and International Environmental and Scientific Affairs, *Limits in the Seas, No. 113: Straight Baseline Claims: Djibouti and Oman* (April, 1992).
[163] *Ibid.*
[164] See US Department of State, *Limits in the Seas, No. 124: Straight Baseline Claim: Honduras* (Office for Oceans Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, 2001).
[165] See US Department of State, *Limits in the Seas, No. 122: Straight Baseline Claim: Thailand* (Office for Oceans Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, 2000).

interpretation of this condition would facilitate the application of article 7 to outlying archipelagos.

Article 31 (3) of the Vienna Convention on the Law of Treaties provides that in interpreting a treaty 'there shall be taken into account, together with the context ... (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation'. Subsequent practice is important for the interpretation of a treaty as it offers clarification with regard to what a specific provision was intended to mean or what the parties to the treaty desire the provision to mean. It is possible that subsequent practice may not only clarify the meaning of a provision but also offer an interpretation different from the ordinary meaning to be given to the terms of the provision.[166] Going further from the latter, it is accepted that subsequent practice may contribute to the revision of a provision of an international treaty.[167]

Indeed, subsequent practice regarding the application of article 7 supports a loose interpretation of the conditions stipulated by that article and particularly the determination of which coast may qualify for the application of a straight baseline system. Prescott has mentioned that nowadays any state can draw straight baselines in whichever coast of its land regardless of the conditions stipulated in article 7 and refer to another similar case as a precedent.[168] This subsequent practice might indeed have an impact on the interpretation of the specific provisions of the Convention. However, as mentioned above for subsequent practice to be recognised as authoritative in the

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[166] See G.Fitzmaurice, 'The Law and Procedure of the ICJ, 1951-4', 33 *BYIL* (1956), p. 223-5; *ibid*, 'The Law and Procedure of the ICJ', 28 *BYIL* (1951), p. 20-21; M.N.Shaw (2003), p. 841; I.Brownlie (2003), p. 605; A.D.McNair, *The Law of Treaties* (Oxford, Clarendon Press, 1961), p. 424 *et seq.*. The most representative example of interpretation going beyond the textual meaning of the wording of a provision concerns article 27 (3) of the UN Charter which provides that decisions of the SC on non procedural matters shall be made by the 'affirmative vote of nine of its members 'including the concurring votes of the permanent members'. The term concurring despite its implying an affirmative vote, has been interpreted by the members of the UN as meaning 'not objecting' and such decisions have been taken in the absence or abstention of a permanent member of the SC; see A.Aust, *Modern Treaty Law and Practice* (Cambridge: Cambridge University Press, 2000), p. 195. This interpretation on the basis of subsequent practice was accepted by the ICJ in its advisory opinion on *Legal consequences for states of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)* (Advisory opinion of 21 June 1971), *ICJ Reports*, p. 22, para. 22.

[167] M.Shaw (2003), p. 841; se also *US-France Air Transport Services Agreement Award,* 38 *ILR*, p. 245-248, 256-8; *Case concerning the Temple of Preah Vihear* (Cambodia v. Thailand, Merits, Judgment of 15 June 1962), *ICJ Reports*, p. 33-4; *Namibia case,* p. 22; *Taba Award, 80 ILR*, p. 226, part. 231.

[168] J.R.V.Prescott in G.Blake (ed) (1987), p. 38.

interpretation of a provision, it should be accepted as such by all the parties of the Treaty.[169] What is more, only consistent state practice may be conclusive of the interpretation the states parties to the treaty meant to adopt for the specific provisions.[170]

It is true that state practice concerning straight baselines has attracted little attention by other states.[171] However, the USA has been particularly vigilant and has protested and in some instances challenged the drawing of straight baselines through operational assertions within the framework of the Freedom of Navigation Programme.[172] The US is not a party to the LOSC and therefore its conduct cannot be taken into account for the interpretation of the Convention.[173] There are instances of protests against these systems by state-parties to the LOSC[174] and what is more, the practice among the state-parties is inconsistent. It is true that there is a tendency among states parties to the LOSC to interpret article 7 in a loose way, however, as long as different states have interpreted this provision in a different way, none of the interpretations may be considered as authoritative on the basis of subsequent practice.

D. The status of the enclosed waters

Article 8 paragraph 1 of the LOSC, which incorporated article 5 paragraph 1 of the 1958 TSC provides that 'except as provided in Part IV, waters on the landward side of the baseline of the territorial sea form part of the internal waters of the State'. Therefore, all the waters enclosed by straight baselines have the legal status of

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[169] A.Aust (2000), p. 194.
[170] G.Fitzmaurice (1956), p. 223.
[171] J.R.V.Prescott, in E.D.Brown & R.R.Churchill (eds) (1987), p. 317.
[172] The USA government initiated in 1979 the Freedom of Navigation Programme whose main objective was to challenge through the filing of diplomatic protests and the performance of operational assertions the excessive maritime claims of states and therefore to safeguard US's navigational rights – vital for its national security - all over the world; see *Limits in the seas, No. 112, US Responses to Excessive Maritime Claims* (US Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, 1992), p. 6. See also US Department of Defense, Freedom of Navigation FY 2000-2003 Operational Assertions (found at www.defenselink.mil/policy/sections/policy_offices/isp/fon_fy00-03.html).
[173] It should be, however, noted that it is highly likely that the USA will soon ratify the LOSC; see the statement by the President of the USA, G.W.Bush, urging the Senate Foreign Relations Committee to act favourably for the ratification of the LOSC (May 2007) (found at www.oceanlaw.org); see also letters of support (same website).
[174] See for example Myanmar and India have protested against the baselines applied by Bangladesh; France, Singapore and Thailand have raised their objections against the straight baselines drawn by Vietnam. It should however be noted that most of the states have chosen to ignore the baselines applied by others; see M.W.Reisman & G.S.Westerman (1992), p. 190.

internal waters, in which the coastal state enjoys full territorial sovereignty.[175] Nevertheless, the expansion of internal waters due to the use of the straight baseline system has led to the adoption of article 5 (2) of the Geneva Convention on the Territorial Sea and the Contiguous zone and article 8 (2) of the LOSC, which provide for an exception to the principle of the absence of innocent passage in the internal waters.[176] According to article 8 (2) of the LOSC 'where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters'.[177] The right of innocent passage exists only in those waters which used to have a different legal status, that is were parts of the territorial sea or the high seas before the drawing of the straight baselines. However, in parts of the enclosed waters, which were considered as internal waters before the application of the straight baseline system, that is waters landward of the low-water mark, like harbours or estuaries, or waters in which the coastal state has historic rights, no right of innocent passage will be recognised in favour of foreign vessels.[178]

The content of the right of innocent passage is the same as the one attributed to foreign vessels in the territorial sea and thus the relevant provisions of the LOSC will apply and specifically section 3 articles 17-26.

Therefore, in the case where an archipelago could qualify for the application of article 7 of the LOSC, as above analysed, the waters between the islands would be internal waters subject to the right of innocent passage recognised for third states' vessels.

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[175] Churchill and Lowe point out that the regime of internal waters has not been regulated in detail in any of the Law of the Sea Conventions, for the reason that internal waters are assimilated to the land territory of the state, where the state has absolute territorial sovereignty. R.R.Churchill & A.V.Lowe (1999), 61.

[176] For the history of the discussions regarding the inclusion of this exception to the juridical status of the internal waters see Report of the ILC to the GA on the Work of its Seventh Session, GA Off.Rec., 10th Session, Suppl. No. 9, Doc. A/2934, New York, 1955, pp. 25-49.

[177] Similarly Article 5 (2) of the TSC.

[178] M.Munavvar (1995), p. 149.

E. Appraisal of the potential application of article 7 of the LOSC in the case of dependent midocean archipelagos

The question which should be answered is whether article 7 of the LOSC may be applied to archipelagos in a way so as to reflect the archipelagic concept, which consists in the measurement of the territorial sea from straight baselines encircling the archipelago and the unification of the enclosed waters under a regime in which the state will exercise sovereignty. The application of straight baselines on the basis of article 7 theoretically seems to attain such objectives; not though without implications.

There are many difficulties in the application of this article to groups of islands. Primarily, article 7 was not intended and was not thus drafted to regulate the application of straight baselines in such cases. The application of article 7 in the case of dependent midocean archipelagos would necessitate an original and 'loose' interpretation of the rules stipulated in this article.[179] However, the question of how flexible the conditions of article 7 can be in the light of this article being applied to a case, which it was not at the first place intended to regulate, is difficult to answer. According to a textual interpretation of the conditions of this article, article 7 may only be applied in cases where an archipelago is dominated by a large island, which seen on its own merits could qualify as the coast of a mainland. Article 7 may, thus, be applied provided that this coast is deeply indented and cut into or fringed with islands. What is more, as analysed above, the UN, the ICJ and international scholars have been 'strict' in their interpretation of the conditions prescribed by these rules and so have been states like the US.[180]

As has been mentioned above, the possibility of using article 7 in groups of islands has been acknowledged – at least in principle – by the ICJ in the *Qatar-Bahrain case*. However, in the same case, the Court adopted a strict interpretation of the conditions of article 7 rejecting the application of straight baselines, as the islands in the southeast part of the archipelago were few in number and did not compose a

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[179] J.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1994), p. 183 referring to the system of straight baselines applied by Australia around the Houtman Abrolhos Group.
[180] It should be noted that the USA is not a contracting party to the LOSC.

'fringe' but rather a cluster of islands.[181] The Court noted that the archipelagic regime, if proclaimed by Bahrain, could have united the islands of the archipelago.

A strict interpretation of the conditions stipulated in article 7 especially with regard to the distances between the islands – as proposed by authors, the UN and states such as the US - will inevitably limit the application of straight baselines to parts of archipelagos and therefore, article 7 will be unlikely to cover wholly most of midocean dependent archipelagos. In fact, most midocean dependent archipelagos are groups of islands covering a large maritime area in the same way as archipelagic states do. In most cases, these archipelagos consist of islands of similar size, which are located close to each other so as to form a compact whole comprising of the land of the islands and the intertwined waters. In this context, few midocean dependent archipelagos can benefit from the application of article 7 on straight baselines.

However, the potential application of article 7 to groups of islands is more advantageous for groups of islands than the application of the archipelagic regime of the LOSC as prescribed in Part IV of the LOSC.

Article 7 of the LOSC is in a way broader than the archipelagic regime prescribed in Part IV of the LOSC in the sense that this article does not necessitate the group of islands to be an archipelago in its legal sense. The political, economic or historical context of the archipelago or whether the archipelago forms a political or economic unit or has historically been regarded as such as stipulated in article 46 (b), are irrelevant for the application of straight baseline on the basis of article 7 of the LOSC. For the application of article 7 to groups of islands, it suffices that the geographical conditions are fulfilled and therefore article 7 may be applied to a group of islands that does not qualify as a legal archipelago under article 46 (b) of the LOSC.

Moreover, the waters enclosed by straight baselines have the legal nature of internal waters where the state has absolute sovereignty subject only to the right of innocent passage attributed to foreign vessels. On the contrary, the sovereignty of an archipelagic state over its archipelagic waters is subject to more extensive limitations. Apart from the right of innocent passage recognised in favour of foreign vessels in the archipelagic waters, the right of sea-lanes passage accords foreign vessels and

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[181] See *supra* p. 86.

aircrafts the unsuspended right of passage and overflight respectively in sea lanes designated by the archipelagic state. Furthermore, non-navigational rights such as fishing or the laying of cables have been recognised in favour of states neighbouring the archipelago as well as of those states that have traditionally enjoyed such rights in the archipelagic waters. Therefore, it seems that, at least with regard to the status of the enclosed waters, the application of article 7 of the LOSC gives more extensive rights to archipelagos qualifying for the application of a straight baseline system under this article.

In the next chapter, the practice of continental states in their outlying archipelagos will be assessed on the basis of its compatibility with article 7 and the conditions prescribed by this article, as those were analysed above.

2.3.1 Article 10 of the LOSC: islands forming juridical bays

Despite the fact that in the discussions preceding UNCLOS III, the proposals regarding the application of straight baselines to groups of islands and closing lines to bays were linked and the same baseline length was proposed for both cases,[182] article 10, as embodied in the LOSC, may have only minor relevance to groups of islands.[183] A provision which may be deemed as relevant is article 10 (3) of the LOSC which provides that 'because of the presence of islands an indentation has more than one mouth'. It has been argued that islands located close to the coast may form a well-marked and landlocked indentation which, provided that the conditions of article 10 are met, may be considered as a juridical bay. It should be noted that in this case, the bay is formed entirely because of the presence of the islands while the mainland coast presents no indentation.

Authors have indeed accepted the potential application of article 10 in the case of juridical bays formed by islands.[184] There are also a few cases of state practice. For

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[182] See Chapter 1, p. 20 particularly note 19.

[183] In the case of a bay formed in the coast of an island article 10 is applicable.

[184] G.S.Westerman, *The juridical bay* (Oxford: Oxford University Press, 1987), p. 147: 'the islands themselves serve to form an indentation into the coast of a single state, a situation fully contemplated by the drafters'. The UN Office for Ocean Affairs and the Law of the Sea has pointed out that the Convention does not cover such a situation but has accepted that in situations where relatively large islands extend or even form one side of a bay, 'it might be justifiable to use a point on the island as one of the natural entrance points', *UN Office for Ocean Affairs and the Law of the Sea Examination of the Provisions on Baselines*, p. 31. It has been suggested by Hodgson and Alexander that 'islands themselves may constitute the headlands of a bay under certain conditions. These islands must closely

example, the State of Maine has drawn a closing line in the bay formed between Long Island and the mainland coast (see Figure 2). Similarly, the State of Louisiana has also applied such a system in a part of its coast where the existence of some islands form a juridical bay. These instances of state practice were found by the US Supreme Court as valid under international law.[185]

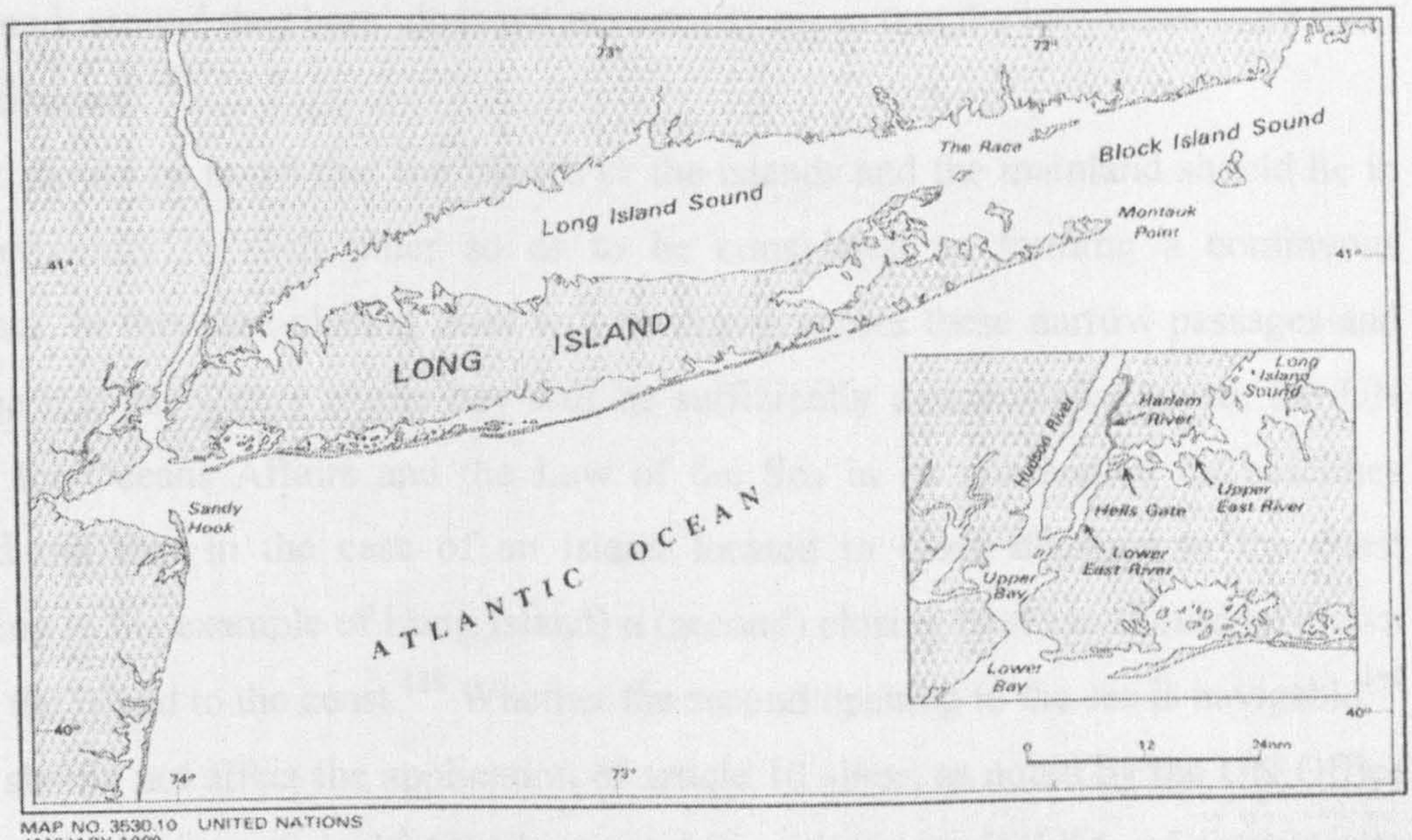

Figure 2: Long Island

Source: *UN Office for Ocean Affairs and the Law of the Sea Examination of the Provisions on Baselines*, p. 32.

An argument rejecting the application of article 10 in these cases concerned the fact that the bay would have apart from its proper mouth another opening to the sea (that is, the water passage between the islands or between the islands and the

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relate to and be associated with the adjacent mainland'. R.D.Hodgson & L.M.Alexander (1972), p. 17. See also J.R.V.Prescott, *The Maritime Political Boundaries of the World* (1985), p. 56-7 (and the jurisprudence provided of the US Supreme Court and the Australian High Court). Prescott presents four situations where islands may be considered to produce bays: a bay formed by two islands against a smooth coast; a bay formed by one island against a smooth coast; a bay formed by an island located in a coastal irregularity; a bay extended by an adjacent island. See also P.B.Beazley (1987), p. 24.

[185] *USA v. State of Maine*, 469 *U.S.*, p. 504 *et seq. US v. Louisiana*, 394 *U.S.* p. 60-2; See also *State of Alaska v. USA*, 545 *U.S.*, p. 92-96 where the US Supreme Court reiterated the principle of the application of a closing line in the case of bay formed by islands; however, in that case it rejected the contention raised by Alaska as the conditions of the existence of a juridical bay were not satisfied.

mainland) and thus the enclosure of the waters of the bay would not be complete. [186] The US Supreme Court rejected this argument and pronounced that 'no language in article 7 or elsewhere positively excludes all islands from the meaning of the 'natural entrance points' to a bay. Waters within an indentation which are 'landlocked' despite the bay's wide entrance surely would not lose that characteristic on account of an additional narrow opening to the sea. That the area of a bay is delimited by the 'low-water mark around the shore' does not necessarily mean that the low-water mark must be continuous'.[187]

It should be noted that the islands or the islands and the mainland should lie in such proximity to each other so as to be considered as forming a continuous landmass. In this case closing lines will be drawn across these narrow passages and thus the internal waters of the bay will be sufficiently demarcated. Indeed, the UN Office for Oceans Affairs and the Law of the Sea in its publication on baselines pointed out that in the case of an island located in close distance to the coast (referring to the example of Long Island) a (second) closing baseline should be drawn to join the island to the coast.[188] Whether the second opening to the sea is navigable[189] or not should not affect the application of article 10 since, as noted by the UN Office for Oceans Affairs, article 10 (3) 'does not deal with the navigability of entrances to bays'.[190]

This narrow passage between the islands or the islands and the mainland coast is not actually part of the mouth of the bay and should not be regarded as such. However, a case presented by Beazley is somehow different in the sense that two bays are formed because of the proximity of a rather large island to a mainland coast (see Figure No. 3). He argues that it seems justifiable to treat the two ends of the intervening channel as bays drawing two closing lines across them.[191]

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[186] See the arguments raised by the US Federal Government in the dispute against the State of Louisiana, *US v. Louisiana*, p. 63 (fnt 83).
[187] US v. Louisiana, 394 *U.S.*, p. 60-2; see also *US v. Maine*, 469 *U.S.*, p. 504-5. However the US Supreme Court noted that the islands should be so integrally related to the mainland so as to be considered as part of it; *US v. Maine*, p. 504-5.
[188] *UN Office for Ocean Affairs and the Law of the Sea Examination of the Provisions on Baselines*, p. 31.
[189] In the case of Long Island this passage is not navigable.
[190] *Ibid.*
[191] P.B.Beazley (1987), p. 24.

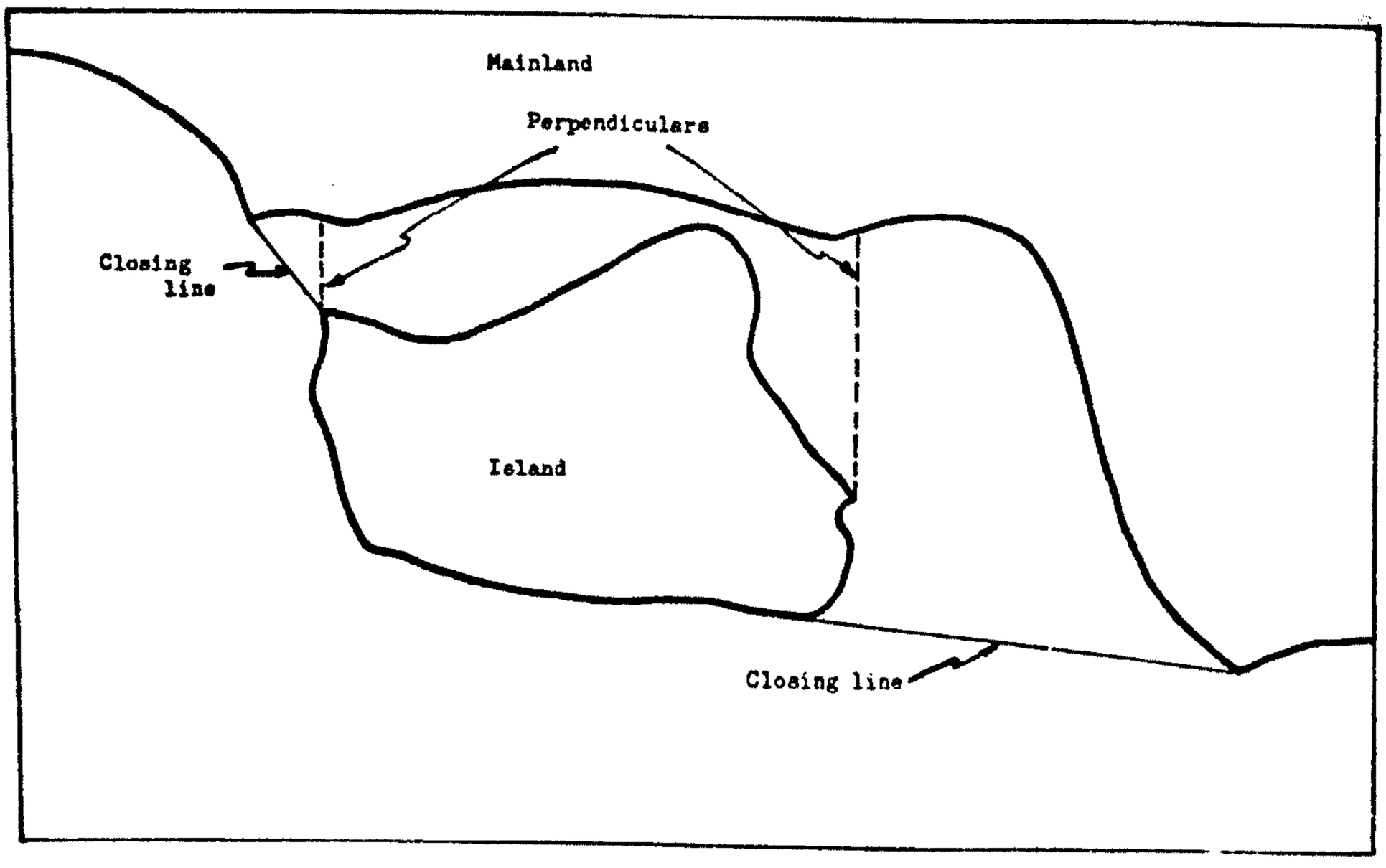

Figure 3

Source: Maritime limits and Baselines: A guide to their delineation, P.B.Beazley (The Hydrographic Society, London, 1987)

On the basis of these observations, it could also be suggested that two or more islands may form a juridical bay in the sense that the islands are related in such a way so as to form a well-marked and landlocked indentation. In this case, a closing line joining the headlands of these islands could be drawn on the basis of article 10 of the LOSC.

For illustrative purposes, Figure 4 shows a hypothetical example of this case. Islands (A)'s and (B)'s western sides are located close to each other forming a narrow passage; the opening to the eastern side of the group may be considered as the mouth of the bay and a closing line could be drawn. A further closing line should close the narrow passage in the western side of the group.

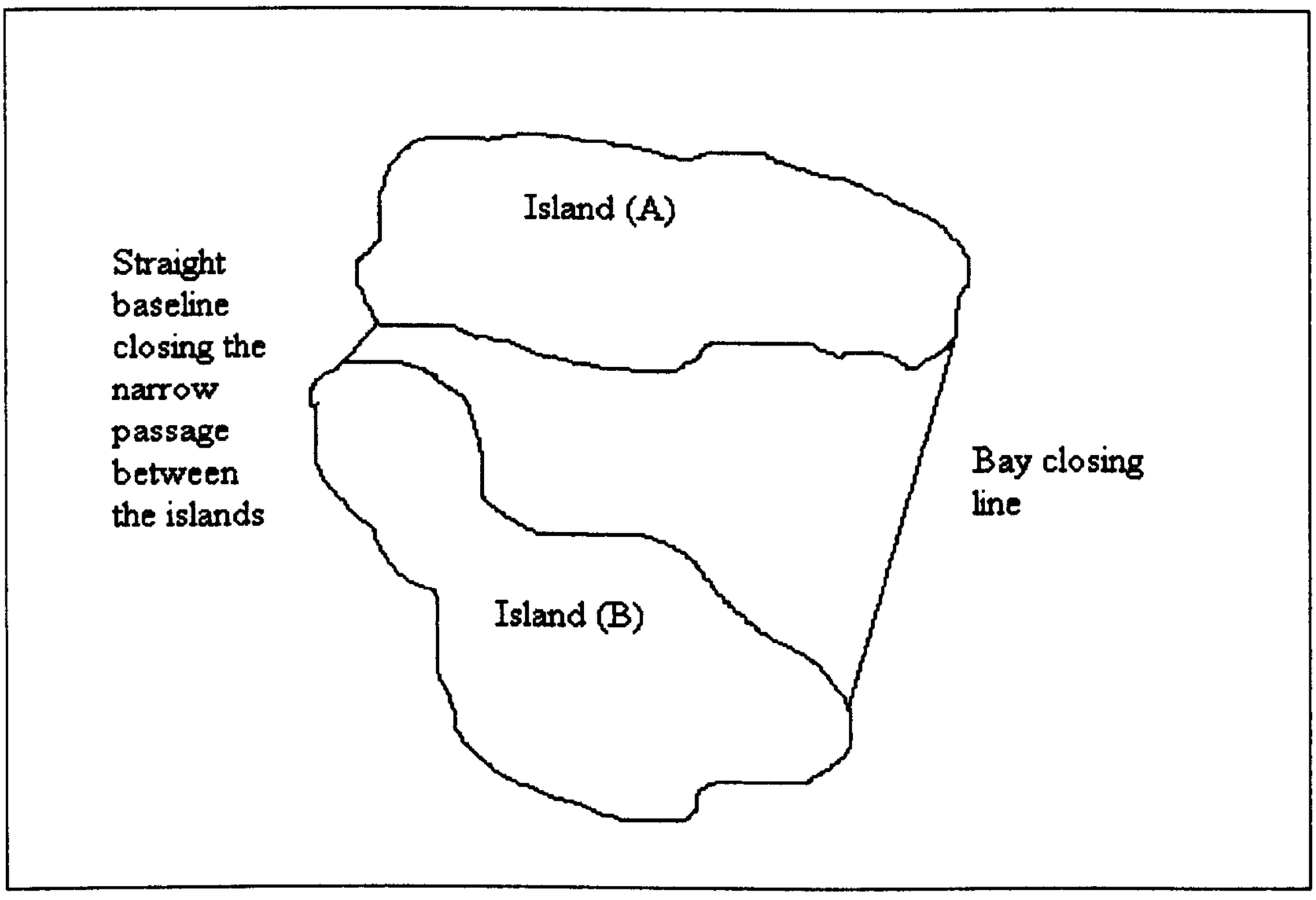

Figure 4: Hypothetical group of islands forming a juridical bay

However, it should be noted that in reality groups of islands compose much more complicated geographical features. An example where islands may form a bay is the case of the Sjaelland Island in Denmark. As we will see in Chapter 3, Denmark has applied straight baselines around the whole of the archipelago. Article 10 may be relevant to the western part of the coast where the islands of Sjaelland, Lolland, Falster and Møn create an indentation (see Figure 5). The straight baselines drawn by Denmark in this part of the archipelago do not conform to article 10 (the aggregation of segments 69-70 and 70-71 exceed the maximum of the permissible length for the closing line), however, the criteria for a juridical bay could be satisfied if a closing line was drawn from basepoint 70 to the nearby small island and from there to the coast. The semi-circle test would also be satisfied. The fact that there are narrow passages between the islands in the eastern side of the archipelago does not preclude the application of article 10, as was explained above.

MISSING PAGES

Chapter 3: The practice of continental states in their outlying archipelagos

> 'In establishing a special regime on archipelagos ... due attention should be given to existing state practice on the matter. One cannot escape the feeling in considering the possibilities of devising new rules on the regime of outlying archipelagos, that one is engaging in patchwork'.
>
> M.Kusumaatmadja, 'The Legal Regime of Archipelagos: Problems and Issues', 1973.

3.1 INTRODUCTION

One of the problematic aspects in the treatment of archipelagos in international law concerns their 'wide range of geographical, physical attributes'[1] in the sense that archipelagos as geographical features take various forms, being composed of islands small or large, few or many and being arranged in different patterns. For example, the Faroe Islands, composed of islands located at close distance to each other, bear no resemblance with the sparsely scattered islands of the archipelago of French Polynesia. Similarly, the Galapagos Islands composed of similarly sized islands have no common element with the Kerguelen Islands, where one big island dominates the archipelago.

Geography plays indeed a critical role in the treatment of archipelagos in international law. For examining the practice of continental states in their outlying archipelagos, a distinction of archipelagos on the basis of their size or preferably on the basis of the maritime space covered by them, as presented by Dubner, will be used. Archipelagos take the following forms:

'(1) The islands are scattered, at random, over a radius of more than twice the breadth of the territorial sea and are not grouped together in any particular pattern. In this situation, there occurs wide areas of high seas between the islands.

(2) The islands are not scattered over a large distance. Instead, they are grouped together, at random, with smaller areas of high seas flowing between the islands.

(3) There is one large mainland-type island with a few islands located within a close proximity both to the large island and to the other fringe islands. In this situation,

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[1] D.W.Bowett (1979), p. 90.

the total square miles of high seas flowing between all of the islands is less than the total square miles of inland mass'.[2]

Other authors make a distinction between outlying archipelagos dominated by one or two large islands and archipelagos with similarly sized islands without though making any further classification in the latter category between broadly-scattered and closely-knit archipelagos.[3] As it will be shown from the analysis of this Chapter, states have not treated outlying archipelagos composed of similarly sized islands in the same way. These states have applied straight baselines to archipelagos composed of islands lying in close proximity to each other, whereas they have refrained from applying any special regime to dependent archipelagos which are widely scattered in a broad maritime area.

Furthermore, as argued in Chapter 2, geography may play an important role with regard to the potential application of article 7 of the LOSC to groups of islands. In that Chapter it was argued that in the case in which an archipelago is dominated by a comparatively large island, article 7 may be applied as long as it is shown that the other islands of the group fringe the coasts of the main island satisfactorily. In this sense, the straight baselines systems applied by continental states could be deemed as conforming to the LOSC. Indeed, as will be shown in the present Chapter, states have applied straight baselines to archipelagos with these geographical characteristics.

This Chapter examines and assesses the practice of continental states in their outlying archipelagos taking into consideration the implications occurred by the great variety of archipelagic formations and particularly the distinction of archipelagos on the basis of their geographic particularities as presented above. It should also be mentioned that there are continental states which have applied straight baselines encircling their outlying archipelagos and others which have applied no special system but use the low-water mark on the coast of each island as the baseline for the measurement of the maritime zones.

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[2] B.H.Dubner (1976), p. 67-8. With regard to the third category he points out that 'the total square miles of high seas flowing between all of the islands is less than the total square miles of inland mass'.

[3] M.Munavvar (1995), p. 6. Similarly, Narokobi refers to 'the geographically insular archipelago' and he suggests as examples the UK, Iceland, Denmark with regard to Sjaelland and Greenland, Cuba, Dominican Republic, Haiti and Papua New Guinea. C.S.N.Narokobi in J.M.Van Dyke, L.M.Alexander & J.R.Morgan (eds) (1988), p. 221. From the examples mentioned by Narokobi, the Dominican Republic and Papua New Guinea have claimed archipelagic baselines whereas the other states have applied straight baselines encircling their archipelagic territory (with the exception of the UK which has applied straight baselines to some parts of its coasts).

The examination of the practice of continental states in their outlying archipelagos has a dual significance for the present thesis. This practice will be, firstly, used to demonstrate the limits and constraints of the use of articles 7 of the LOSC for the case of outlying archipelagos as well as the implications emanating from such application. In this respect, the legality of the practice of states, as enacted in their national legislation and presented in maps, will be assessed on the basis of the conditions prescribed in articles 7 of the LOSC, as analysed in Chapter 2. This will be the scope and the aim of the present Chapter. However, the examination of state practice will serve an additional purpose. Particularly, state practice will be presented with a view to assessing whether such practice has contributed to the formation of customary law,[4] according to which a special regime has been established for dependent outlying archipelagos. The law-creating value of such practice will be the study of Chapter 4.

3.2 The practice of continental states applying a special system for the measurement of the maritime zones of their outlying archipelagos

The first claims of continental states in their outlying archipelagos were raised by Denmark in the Faroe Islands and by Ecuador in the Galapagos Islands in 1903 and 1934 respectively. Both states considered their archipelagos as a compact whole for fishing purposes restricting the fishing rights of foreign vessels in the waters between the islands and around the whole archipelago. Following the judgment of the ICJ in the *Fisheries case*, these states applied a system of straight baselines for the delimitation of their maritime zones joining the outermost islands of the archipelago and considering the enclosed waters as internal waters of the state. Their example has been followed by other states possessing archipelagos like Norway, Australia, Spain, Portugal, France, UK, China, Eritrea, Saudi Arabia, Sudan and the United Arab Emirates.

It should be emphasised that these states, aware that they cannot apply the archipelagic regime of the LOSC due to the dependent political status of their archipelagos, have not proclaimed these systems as an analogical application of the archipelagic regime of the LOSC. These states have applied straight baseline systems either to groups of islands dominated by one large island or to groups where the islands

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[4] For this reason the presentation of state practice is not restricted to the legislation presently in force but include a brief history of previous practice, particularly from the time of the initiation of claims, with the view to demonstrating the duration and evolution of such practice. These elements will be assessed in Chapter 4 when the constituent elements of customary law will be examined.

are located at close distance to each other. They have, therefore, refrained from enclosing large areas of high seas within their straight baseline systems.

Furthermore, the compatibility of the systems applied by continental states with article 7 of the LOSC depends upon their geographic particularities. It was argued in Chapter 2 that in the case of an archipelago dominated by a comparatively large island, article 7 may be applied as long as it is shown that the other islands of the group fringe the coasts of the main island satisfactorily. The distinction in 'archipelagos dominated by one or two larger islands' and 'archipelagos with similarly sized islands or with islands located in a random way' reflects the geographical particularities presented by archipelagos and facilitates the assessment of the compatibility of the applied baseline systems with the provisions of the LOSC and particularly with article 7. It should be, however, emphasised that the important common element in the distinctive treatment of all the cases described here is the application of the archipelagic concept in the sense that straight baselines have been drawn joining basepoints on the outermost islands of the archipelago or specific parts of it.

3.2.1 Archipelagos dominated by one or two larger islands

Before examining and assessing the practice of continental states in outlying archipelagos dominated by one or two large islands, an important aspect concerning the archipelagic concept should be discussed. This issue is connected with whether the straight baselines systems applied to archipelagos dominated by one or two large islands is a reflection of the archipelagic concept or an application of article 7 in coasts fringed by one or more coastal archipelagos. In other words, should archipelagos dominated by one or more large islands be considered as outlying archipelagos or as mainland-type islands fringed by coastal archipelagos?

A. The archipelagic concept and archipelagos dominated by one large island

According to the legal definition of archipelagos contained in article 46 (b) of the LOSC an archipelago means 'a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely inter-related that such islands, waters and other natural features form an intrinsic geographical, economic and political entity or which historically have been regarded as such'. This definition does not distinguish among various types of geographical archipelagos and thus insofar

as there is a group of at least two islands[5] regardless of their shape or size[6] which fulfils the 'unity' requirements prescribed in this article, it may be regarded as an archipelago in the legal sense.

This distinction is reflected not in the 'definitional' article regarding archipelagos (article 46) but in article 47 (1) regarding the conditions for the application of archipelagic baselines particularly concerning the minimum water-to-land ratio. According to this provision, archipelagos, the water-to-land ratio of which is lower than 1:1, cannot apply archipelagic baselines. This condition was prescribed in order to preclude states composed of one large island surrounded by small insular dependencies, such as Australia, UK, New Zealand, Iceland, Madagascar from applying the archipelagic regime.[7] It was thought that these states could anyway apply article 7 concerning coastal archipelagos.[8] It may even be argued that in these cases the application of article 7 seems more appropriate as the waters enclosed by the straight baselines are located in close proximity with the coast of the main island and can therefore be characterised as internal.[9] Indeed, states such as the UK, Iceland, Australia have applied straight baselines systems in parts of their coasts. The same systems have been applied by continental states upon similar geographic features such as Corsica (France), Sardinia and Sicily (Italy), Newfoundland and Graham (Canada). However, there are cases where both article 7 and the archipelagic regime of the LOSC are inapplicable because of the geographic particularities of the group as may be shown by the cases of Malta or St Kitts and Nevis.[10]

In the case of a large island surrounded by much smaller islets and other geographical features, the distinction between outlying archipelagos and coastal archipelagos is not so clear. Churchill and Lowe acknowledging the difficulty in drawing a sharp distinction between coastal and outlying archipelagos refer to the case

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[5] For the disagreement among authors regarding the exact number of islands see Introduction, p. 5-6; it was therein argued that according to the definition of archipelagos in article 46 (b) of the LOSC two islands may be considered as forming an archipelago.

[6] The distance between the islands is relevant, as this will determine the compactness of the group in terms of its being 'closely inter-related'.

[7] H.W.Jayawardene (1990), p. 146.

[8] *Ibid*; see also R.D.Hodgson & R.W. Smith (1975-6), p. 243. D.P.O'Connell (1971), p. 25.

[9] These states would benefit more from the application of article 7 than from the application of the archipelagic regime with regard to their jurisdiction in the enclosed waters.

[10] While both Malta and St Kitts & Nevis constitute archipelagic states in the sense of article 46 (a) of the LOSC, they cannot apply a system of archipelagic baselines because they do not conform to the minimum water-to-land ratio. Nevertheless, Malta has applied a straight baseline system encircling her archipelago; Malta's water-to-land ratio is 0.64:1 and St Kitts and Nevis' is 0.8:1; B.Kwiatskowska (1991), p. 3. See Chapter 4 for the straight baseline system applied by Malta, p. 212.

of Iceland as following: 'is Iceland's straight baseline system in effect tying offshore islands to an mainland coast (and so governed by the rules on straight baselines), as Iceland claims, or is it in reality a system of straight lines drawn around the islands of a midocean archipelago?'.[11] It is generally argued that a geographical feature where a large midocean island is surrounded by smaller islands, islets or rocks, does not reflect the geographical sense of the term archipelago[12] and 'would be better classified as a continental island with coastal archipelagos'.[13]

The difference between the midocean and the coastal archipelago consists in the fact that in the first case there is a mutual attraction between the islands of the group whereas in the second case the mainland coast exercises an attraction force upon the closely located relatively small islands. As presented by O'Connell, 'the essence of the midocean archipelago theory is that such a relationship exists between the features themselves, so that a situation exists which is analogous to that of a complex coast of a continental country'.[14] This relationship does not depend – or at least does not depend solely - on the water-to-land ratio of the archipelago but depends mostly on the size of the islands forming the archipelago and their importance within the archipelagic formation.[15] For example, Sicily or Sardinia cannot be considered as outlying archipelagos as there is only one island with very few islands lying off at some parts of their coasts.[16] The same cannot be said, however, for the Falkland Islands, which form an outlying archipelagic formation, comprised of various islands, islets and other geographical features. It is true that it is difficult to address this issue in general terms and therefore the classification of each archipelago should be conducted on a case-by-case basis.

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[11] R.R.Churchill & A.V.Lowe (1999), p. 119. As noted by Churchill 'it is sometimes difficult to distinguish what may be considered an impermissible use of archipelagic baselines from a permissible use of straight baselines in respect of a group of islands consisting predominantly of one large island (eg. Iceland) or a few large islands (such as Svalbard)'; R.Churchill, 'Norway: Supreme Court Judgment on Law of the Sea Issues', 11(4) *IJMCL* (1996), p. 580.

[12] D.P.O'Connell (1971), p. 24 referring to Iceland.

[13] *Ibid*, p. 25 referring to Madagascar; Bowett classified Cuba, Iceland and Madagascar as coastal archipelagos; D.W.Bowett (1979), p. 84-90; R.Lattion, *L'archipel en droit international* (Lausanne: Editions Payot 1984), p. 66 (referring to Iceland and Madagascar). O'Connell refers to this distinction as 'somewhat artificial' and rightly links this characterisation with the size and the proportion of the islands forming the group. D.P.O'Connell (1971), p. 25 ; Lattion stresses the natural unity of the geographical feature and not the size of the islands : 'cette distinction ne parait cependant pas très pertinente car elle ne se base que sur la taille des îles et non sur leur unité naturelle'. R.Lattion (1984), p. 66, note 18.

[14] D.P.O'Connell (1971), p. 15.

[15] See *ibid*, p. 25.

[16] This is the reason why I have not included these cases in the analysis of the practice of continental states in their outlying archipelagos, as these geographical features do not compose archipelagos but solely islands.

It should, however, be noted that originally the archipelagic concept was conceived as an answer to archipelagic problems stemming from the geographic realities of both coastal and outlying archipelagos.[17] Taking this into consideration, it may be said that the archipelagic concept is relevant in both situations, as the result achieved through the use of straight baselines is to unite the islands of the geographical feature in an integral whole. Article 7 in a way reflects the archipelagic concept in terms of accommodating coastal archipelagos. Coastal archipelagos though not explicitly mentioned as such in article 7 are covered by the provisions of this article.[18] In cases where article 7 referring to a fringe of islands along the coast is inapplicable because of the geographic realities of the archipelago, as will be shown by the analysis of some of the cases presented below, the straight baseline systems applied by states reflect primarily the archipelagic concept in the sense that the archipelago has been encircled by straight baselines from which the maritime zones are measured.

An interesting view with regard to the distinction between outlying and coastal archipelagos was advanced by Denmark in a letter transmitted to the UN in 1957 referring to the draft article prepared by the ILC. Denmark stated the following: 'In its comments on article 10, the ILC mentions the question of formulating a special rule for groups of islands. In the opinion of the Danish Government it should not be necessary to formulate such a rule, because the principle underlying article 5 implies that straight baselines may be drawn between the islands of a group, article 5 should possibly be amended so as to preclude any doubt. It would not appear reasonable to make a distinction between islands lying off a coast and islands forming an independent group. Incidentally any such distinction would be difficult to maintain from a geographical point of view because an island may be so large that in the application of the said principle it should rank equally with a mainland'.[19] A similar view was advanced by Malta and by India during the UNCLOS III.[20] Therefore, according to these views,

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[17] See Chapter 1, p. 26.
[18] M.Munavvar (1995), p. 183.
[19] UNCLOS II Off.Rec., Volume I, Doc.A/CONF.13/5 and add. 1 to 4, p. 82.
[20] Malta stated that 'with only a slight modification of the archipelagic formula – by permitting a coastal state owning an archipelago to draw straight baselines to it – it might have been possible to confine the work of the Santiago Conference to the question of baselines alone, with a great saving in time'; Doc. A/AC.138/SC.II/SR.71 (14 august 1973), p. 9. The Indian delegate voiced a similar view regarding the common treatment between archipelagos which lie close to the coast and outlying archipelagos: 'no distinction should be made between an archipelago that constituted a single State and an archipelago that formed an integral part of a coastal state nor should an archipelago at some distance from the coastal state be treated differently from one located near a coastal state': UNCLOS III Off.Rec., Vol. I, p. 96. The proposals submitted by the Philippines and Yugoslavia during UNCLOS III provided for the application

straight baselines should be equally applied in the case of both coastal and outlying archipelagos. This would indeed avoid any problems deriving from the geographic particularities of groups of islands particularly in the case where a large island dominates an outlying archipelago.

B. The practice of States

There are seven archipelagos composed of one or two large islands in which states have applied straight baseline systems for the measurement of their maritime zones in a way which reflects the archipelagic concept. In most of these cases, article 7, as analysed in Chapter 2, may be deemed applicable. In the following subsection the cases of the Kerguelen Islands, Sjaelland, Svalbard, Falkland Islands, Furneaux Group and Guadeloupe are discussed. Some geographical particularities of the archipelagos are initially presented and the straight baseline systems are assessed on the basis of their compatibility with article 7 and in some instances with other articles referring to baselines such as article 10 on bays or article 6 on reefs. This assessment is performed in order to demonstrate the ambit of the application of article 7 to the case of groups of islands as well as to highlight its insufficiency to reflect the archipelagic concept even in cases of archipelagos with one or two large islands dominating the group. What is more, it will be shown that states have applied the straight baseline concept exceeding the formalistic conditions of article 7 with a view to encircling the whole group of islands and considering it as a uniform whole.

1. Kerguelen Islands - France

The Kerguelen Archipelago located in the southern Indian Ocean is comprised of a main island called Grande Terre, which is surrounded by another 300 smaller islands.[21]

By Decree No. 78-112 of 11 January 1978[22] France defined the straight baselines and the baselines for the closure of bays around the Kerguelen Islands from which the breadth of the territorial sea will be measured. Article 1 prescribes the drawing of 31

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of the straight baseline system already prescribed for coastal archipelagos to outlying archipelagos; see Chapter 1, p. 26.

[21] The most important of the smaller islands and islets are the following: Iles Nuagueses, Ile de Castrie, Ile Leyguies, Ile Howe, Ile Saint-Lanne Gramont, Ile Foch, Ile du Port, Ile Violette, Ile de l'Ouest, Ile aux Rennes, Ile St Lanne Gramont. This archipelago is one of the four destricts of the French Southern and Antarctic Lands. Nowadays, it is used by a small number of science teams with a population of 50-100 always present. There are permanent facilities on the main island and there is also a satellite tracking station.

[22] The decree may be found in F.Durante & W. Rodino (eds), *Western Europe and the development of the law of the sea* Vol. II, (Dobbs Ferry, N.Y.: Oceana Publ., 1979), p. 3-4.

straight baselines joining 32 basepoints on the coast of the main island and the smaller islands surrounding it. The baselines used are relatively short with the longest measuring 19.7 n.m. (joining basepoints Y- X).

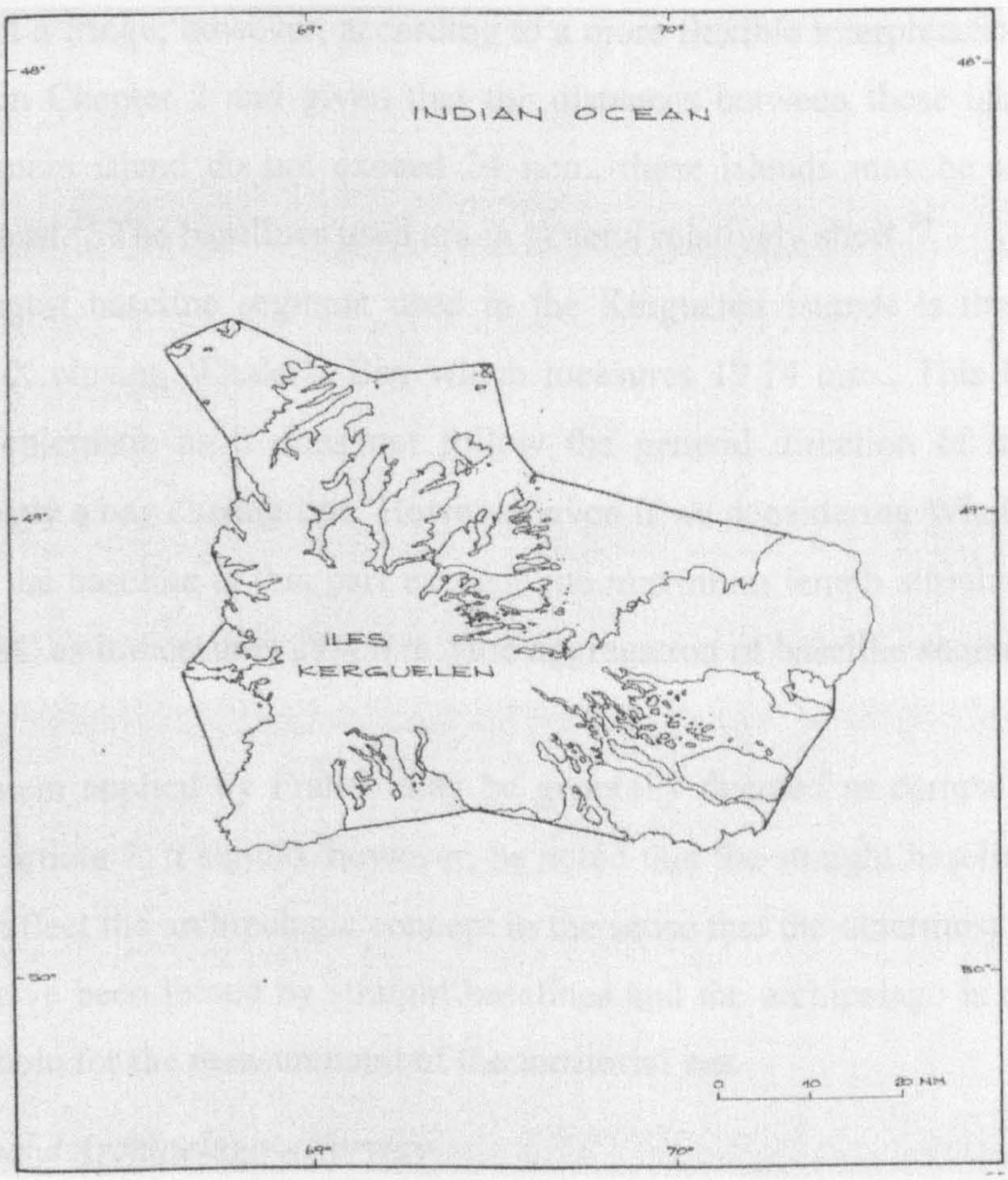

Figure 7

Source: Atlas of Straight Baselines, G.Francalanci, D.Romano, T.Scovazzi

The difficulty in drawing a sharp distinction between coastal and outlying archipelagos, as analysed above, is evident in this case. The Kerguelen Islands may be considered either as an outlying archipelago or as a mainland-type island which is fringed by coastal archipelagos. Nevertheless, regardless of the classification of this archipelago, the system applied by France reflects the archipelagic concept in the sense that the whole archipelago has been encircled by straight baselines.

As regards the application of article 7 of the LOSC, it may be said that considering Grande Terre as a mainland coast fringed by the various surrounding islands, the conditions of this article are met. Indeed, in most parts the coast is deeply indented and there are various islands fringing satisfactorily the coast. However, a not-so-clear

application of article 7 is the baselines in the northern side of the archipelago particularly concerning the baselines joining the islands Croy, Roland and Clugy with the coast of the main island (Jean-Baptisete Charcot Channel) and the baselines joining the islands Castrie and Dauphine (Resolution Channel). These islands resemble mostly a cluster of islands and not a fringe; however, according to a more flexible interpretation of article 7 as presented in Chapter 2 and given that the distances between these islands and the coast of the main island do not exceed 24 n.m., these islands may be considered as fringing the coast.[23] The baselines used are in general relatively short.[24]

The longest baseline segment used in the Kerguelen Islands is the one joining basepoints Y-X closing Whaler's Bay which measures 19.74 n.m.. This baseline may also seem problematic as it does not follow the general direction of the coast and resembles mostly a bay closing line. However, even if we considering Whaler's Bay as a fictive bay,[25] the baseline at this part exceeds the maximum length stipulated by article 10 of the LOSC as it measures 29.4 n.m. (the aggregation of baseline segments Y-X and X-W).

The system applied by France may be generally deemed as compatible with the conditions of article 7. It should, however, be noted that the straight baseline applied by France does reflect the archipelagic concept in the sense that the outermost points of this archipelago have been joined by straight baselines and the archipelago is considered as an integral whole for the measurement of the territorial sea.

2. Svalbard Archipelago - Norway

Svalbard is an archipelago composed of 11 islands in the Arctic Ocean. Particularly, three large islands dominate the main archipelago: Spitsbergen, North East Land (Nordaustlandet) and Edge Island (Edgeoya) with smaller islands in a close proximity such as Prins Karls Forland, Lagoya and Wilhelmaya and three islands forming a small group of islands, the Kong Karls Land, in the west of the main archipelago.[26] In the south of the main archipelago, there are two further islands, the Bjørnøya and the Hopen in a distance of 122.4 nautical miles and 45.5 miles respectively

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[23] The distance between the Ile Roland and Ile de Croy (basepoints A-B) is 7.3 n.m., whereas the distance of these islands from the coast is 10.55 n.m. (basepoints F1-E1) and 14.16 n.m. (total of baselines C-D and D-E)

[24] The baselines also used in the Resolution Channel measure 11.44 n.m. (joining basepoints C1-B1) and 10.2 n.m. (joining the basepoints A1-Z).

[25] See Chapter 2, p. 105 *et seq.* on bays formed by islands.

[26] Information regarding the archipelago can be found at http://islands.unep.ch/CCM.htm.

from the main archipelago. In the northwest, there is a more remote island, the Kvitøya, at a distance of 36 n.m. from Nordaustlandet. Apart from Spitsbergen, Bjørnøya and Hopen, the rest of the islands are uninhabited.

Svalbard composes an integral part of the Kingdom of Norway[27] administered by the Polar Department of the Ministry of Justice through a governor residing in Longyearbyen, the capital of the archipelago.

By Royal Decree of 25 September 1970[28] Norway applied a system of straight baselines for the delimitation of the territorial sea joining 83 basepoints in the west and south area of the Svalbard archipelago and particularly from Verlegenhuken to Halvmaneoya. With regard to the islands Bjørnøya and Hopen Norway applied a system of straight baselines joining basepoints on the coast of each island.

By Royal Decree of 1 June 2001 (Regulations relating to the limits of the Norwegian territorial sea around Svalbard),[29] Norway repealed the fore-mentioned decree and extended the application of the system of straight baselines for the delimitation of the territorial sea around the whole archipelago. Similarly to the 1970 Decree, the islands of Bjørnøya and Hopen are not connected with straight baselines to the main archipelago but their territorial sea is measured from straight baselines joining points on the coast of each island. The same has been provided for the uninhabited island of Kvitøya, which is located at a distance of 36 km at the northeast of the main archipelago. The group of the Kong Karls Land, a smaller group of islands located at a distance of 37.3 from the east side of the main archipelago,[30] has not been connected with straight baselines to the main archipelago; however, a autonomous system of straight baselines has been applied in this small archipelago.[31]

With regard to the main archipelago, the Decree provides for the application of straight baselines joining 101 basepoints on the main islands of Spitsbergen,

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[27] According to the Treaty concerning the archipelago of Spitsbergen, Norway has been attributed full and absolute sovereignty over the archipelago; however, it has been recognised that the participating states enjoy extended rights with regard to 'maritime, industrial, mining and commercial operations on a footing of absolute equality' (art. 3) as well as rights of fishing and hunting in the archipelago and its territorial waters (art. 2). The Treaty, which numbers nowadays 40 state-members, can be found in *AJIL*, Suppl. Vol. 18, 1924, Official Documents, pp. 199-208.

[28] The Decree may be found at www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES /NOR.htm.

[29] The Royal Decree may be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES /STATEFILES/NOR.htm.

[30] The distance has been measured between the far western point of the island of Svenskoya in the Kong Karls Land and the closest point in the coast of the island of Nordanstlandet.

[31] This system will be analysed *infra* p. 158.

Nordaustlandet and Edgeøya and other smaller islands located in a proximity to the fore-mentioned islands.[32] There is no mention in the Decree to the status of the enclosed waters; however, Norway considers these waters as internal since the straight baselines are the points for the measurement of the territorial sea.

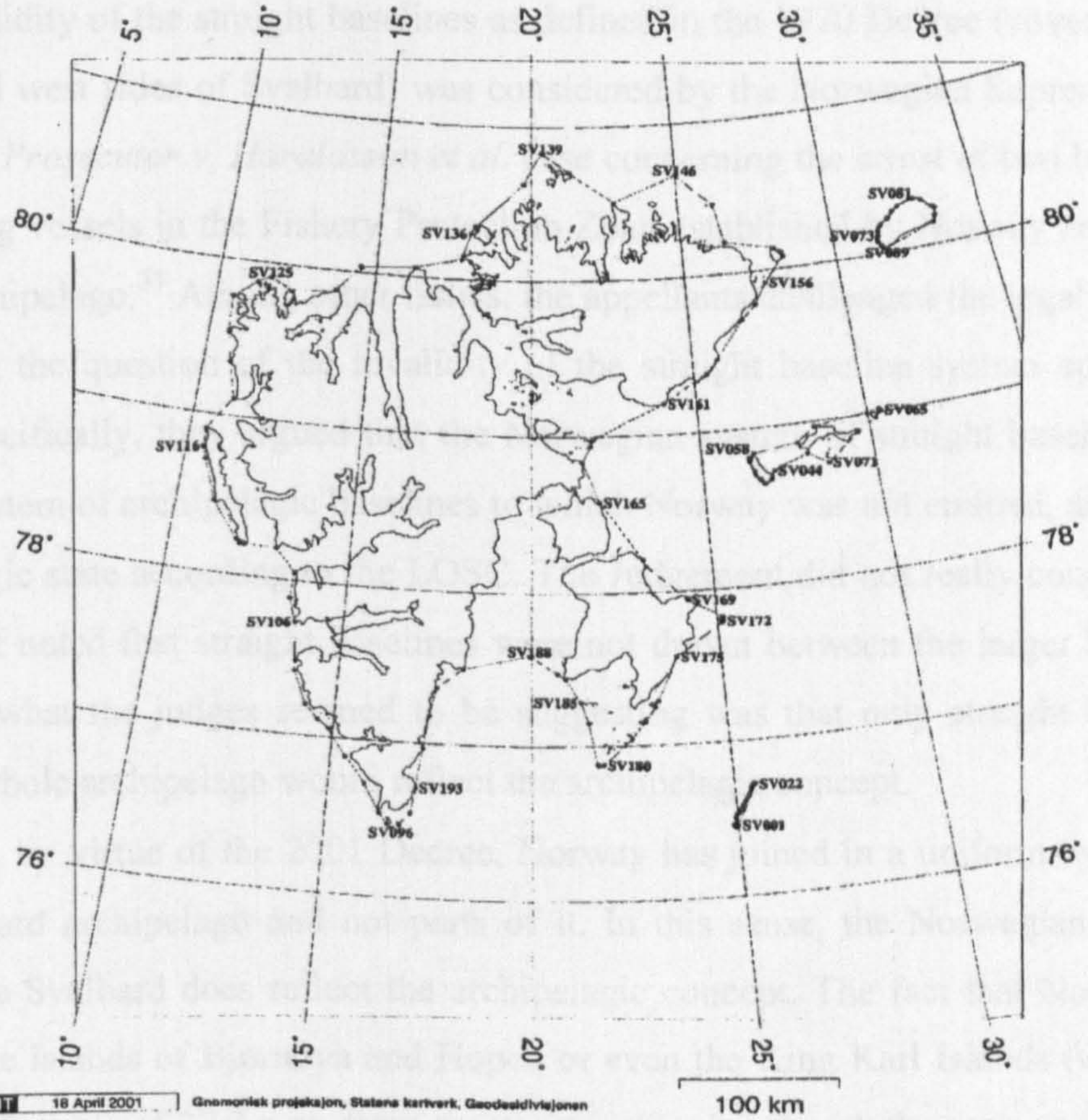

Figure 8

Source: www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/NOR.htm

Again the problem arises of whether Svalbard should be considered as an outlying archipelago or a mainland-type island with coasts fringed by islands. The application of straight baselines in the western part of the archipelago according to the 1970 Decree led Bowett to concluded that Norway did not apply the 'archipelago principle' but relied on separate applications of the straight baseline system accepted by the ICJ in the *Fisheries case* with the intention to 'demarcate sea territory'.[33] He further pointed out as evidence

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[32] In most of the baseline segments Norway has chosen to join features, which are located in close proximity to each other, using relatively short baseline segments; however, she has used a few longer baselines with the longest measuring 29.4 n.m. (SV161-162).

[33] D.W.Bowett ((1979), p. 91.

for the veracity of this observation that Norway had not chosen to unite in the same baseline system some islands of the archipelago, referring specifically to the islands of Bjørnøya and Hopen, which, according to his view, are located in a close proximity to the main archipelago.[34]

The validity of the straight baselines as defined in the 1970 Decree (covering only the south and west sides of Svalbard) was considered by the Norwegian Supreme Court in the *Public Prosecutor v. Haraldsson et al.* case concerning the arrest of two Icelandic-owned fishing vessels in the Fishery Protection Zone established by Norway around the Svalbard archipelago.[35] Among other issues, the appellants challenged the legality of the arrest raising the question of the invalidity of the straight baseline system applied by Norway. Specifically, they argued that the Norwegian system of straight baselines was actually a system of archipelagic baselines to which Norway was not entitled, as it is not an archipelagic state according to the LOSC. The Judgement did not really consider this argument but noted that straight baselines were not drawn between the larger islands.[36] Apparently, what the judges seemed to be suggesting was that only straight baselines joining the whole archipelago would reflect the archipelagic concept.

Indeed, by virtue of the 2001 Decree, Norway has joined in a uniform system the whole Svalbard archipelago and not parts of it. In this sense, the Norwegian baseline system in the Svalbard does reflect the archipelagic concept. The fact that Norway has not joined the islands of Bjørnøya and Hopen or even the King Karl Islands (which are located in a distance of 37.3 n.m. from the main archipelago) with the main archipelago, cannot be considered as an indication that Norway has not been motivated by the archipelagic concept, as noted by Bowett, but it rather reveals Norway's perception with regard to the limits of the rule on the basis of which the archipelagic concept may be applied.[37]

It should, however, be noted that there are indeed parts of the coasts of the main island which can be thought as fringed by islands (especially the western coast) and therefore article 7 of the LOSC may be deemed applicable. The US State Department accepted the validity of the straight baselines drawn around the west coast of the

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[34] He particularly compares the Norwegian baseline system in the Svalbard with the system used by Ecuador in the Galapagos Islands: 'the contrast between the Galapagos and Svalbard practice is marked, for Bear Island (Bjørnøya) is about as distant as Isla Darwin from the main island', *ibid*, p. 92.
[35] R.Churchill (1996), p. 576.
[36] *Ibid*, p. 579-580.
[37] See Chapter 4, p. 250 *et seq*...

archipelago, as prescribed in the 1970 Decree, on the basis of article 4 of the TSC and the principles laid down by the ICJ in the *Fisheries Case*.[38] However, it is difficult to assume that the baselines joining the large islands of the archipelago together are compatible with article 7 of the LOSC.

3. Sjaelland and Laesø Islands - Denmark

Sjaelland is the biggest island in Denmark located between the Kattegat and the Baltic Sea and separated from Fyn Island by the Store Belt and from Sweden by the Oresund. The Danish capital Copenhagen is located on the island.

By Order No. 437 of 21 December 1966 on the Delimitation of the Territorial Sea[39] as amended by Decree no. 189 of 19 April 1978, Denmark applied a system of straight baselines for the delimitation of its territorial sea around the mainland and other insular territories. With regard to the Danish islands, Denmark enclosed certain closely related islands within single baseline systems and particularly the groups formed by the islands of Sjaelland, Laesø and Christiansø and the surrounding smaller islands. In 1999, Denmark revoked this Order by Act No. 200 of 7 April 1999 and extended the territorial sea to a limit of 12 nautical miles. Furthermore, by virtue of the Executive Order No. 680 of 18 July 2003 amending the Executive Order No. 242 of 21 April 1999 Denmark indicated the coordinates of the baselines for the measurement of the territorial sea.[40] With regard to its insular territory Denmark applied straight baselines around the groups of Sjaelland, Laesø and Christiansø (the case of Christiansø is dealt with in the next subsection).

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[38] *Limits in the Seas, No. 39, Straight Baselines: Svalbard* (US Department of State, Office of the Geographer, Bureau of Intelligence and Research, July 1972), p. 4. It was pointed out that the coastal area in the entire western coast of the island 'is heavily fjorded and fringed with many small islands and rocks' and thus 'is well-suited to the creation of a straight-baseline system' while 'the southeast coast is relatively smooth and lacks deep embayments'.

[39] The text of the order may be found at UN Legislative Series Doc. ST/LEG/SER.B/15, p. 71.

[40] The Order may be found at Division for Oceans Affairs and the Law of the Sea, *Law of the Sea Bulletin, No. 53* (N.York: UN Publ., 2004), , p. 44 *et seq.*

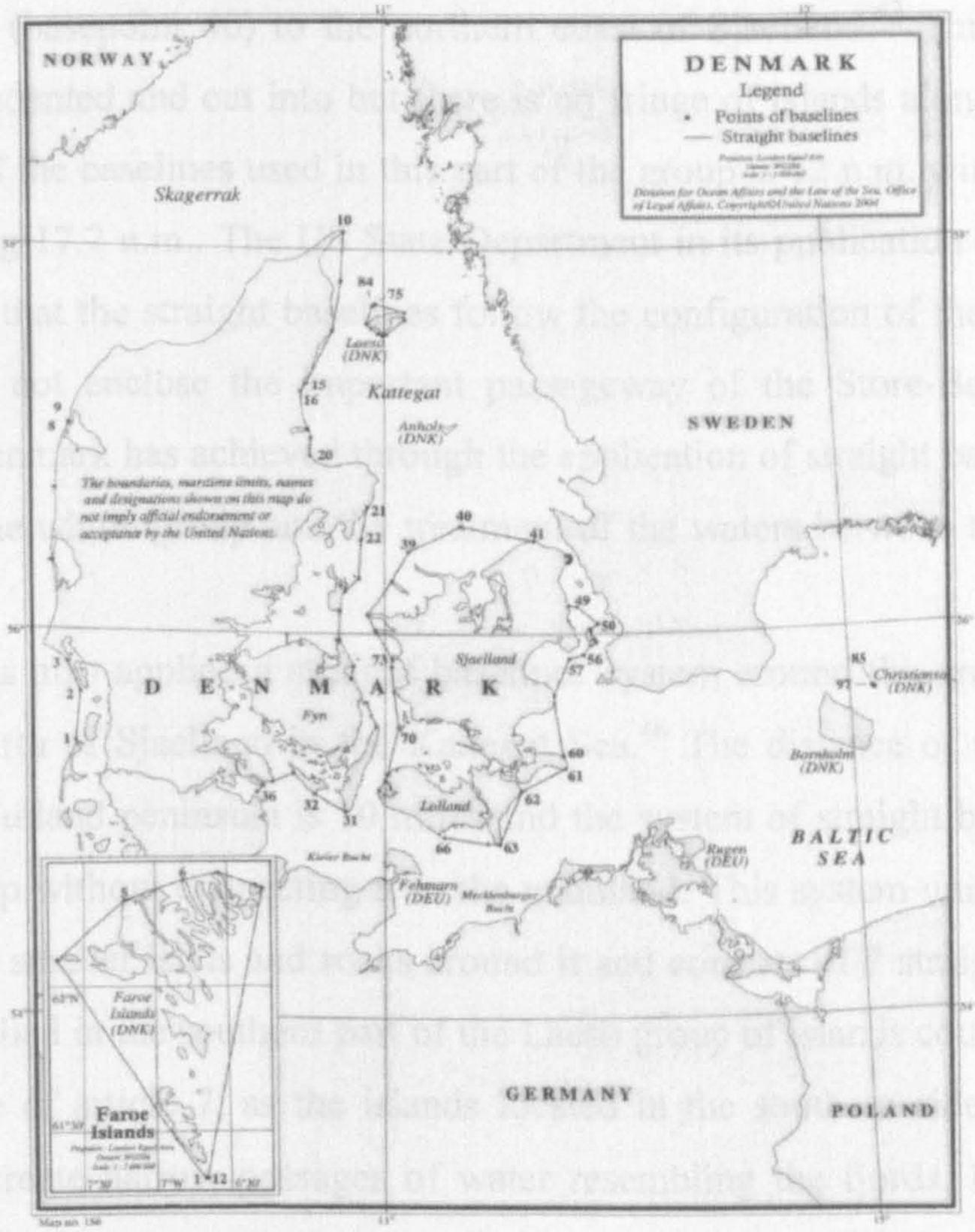

Figure 9

Source: Law of the Sea Bulletin, No. 53, Division for Ocean Affairs and the Law of the Sea, (Office of Legal Affairs, N.York, 2004), p. 44.

Particularly, the Order provides for the drawing of 31 straight baselines joining specific basepoints on the Island of Sjaelland and the islands surrounding it.[41] Like in the case of Svalbard, this group consists of the main island of Sjaelland, three relatively smaller islands (Lolland, Falster, Møn) and various other small islets, rocks and other geographical features). Considering Sjaelland as the main coast of article 7 it could be thought that the surrounding islands fringe satisfactorily its coasts.[42] The only problematic part may be the baselines in the northern part of Sjaelland where segments 37 to 41 join two small islets (basepoints 38, 39) to an outlying reef northwest of the

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[41] These islands are the following Sjaelland, Amager, Saltholm, Hessel, Eskils, Sejer, Neksel, Or, Sprog, Om, Agers, Orm, Glaen, Musholm, Lolland, Falster, Mon, Vejr, Fem, Fej, Rtg, Ask, Bog, T'r, Eneh, Nyord, Gavn, En, Dybs, Lang, Far, Elleore, Masnø, Vigsø. A list of all Danish islands may be found at http://www.dxawards.com/den-island.htm. The longest baseline segment does not exceed 22 n.m. (basepoints 40-41).

[42] US State Department, Limits in the Seas No. 19 – Revised: Straight baselines: Denmark (Office of the Geographer, Bureau of Intelligence and Research, 1978), p. 11.

island of Hesselø (basepoint 40) to the northern coast of Sjaelland.[43] This part of the island is indeed indented and cut into but there is no fringe of islands along the coast.[44] The total length of the baselines used in this part of the group is 62 n.m. with the longest segment measuring 17.2 n.m.. The US State Department in its publication of the Limits in the Seas noted that the straight baselines follow the configuration of the coast of the Sjaelland and do not enclose the important passageway of the Store-Belt to Danish waters.[45] What Denmark has achieved through the application of straight baselines is the encirclement of the whole group and the treatment of the waters between the islands as internal.

Denmark has also applied a straight baselines system around the group of Laesø located in the North of Sjaelland in the Kattegat Sea.[46] The distance of this group of islands from the Jutland peninsula is 10 miles and the system of straight baselines used surround the group without connecting it to the mainland. This system unites the island of Laesø with the smaller islets and rocks around it and consists of 7 straight baselines. The baselines applied in the southern part of the Laesø group of islands could be deemed as valid by virtue of article 7, as the islands located in the southern side of the main island of Laesø create narrow passages of water resembling the fjords. However, the same cannot be said for the straight baselines in the northern part of the group where the three islands called Nordre Renner cannot be deemed as fringing the northern coast of Laesø. The baselines used are, however, relatively short not exceeding 9 n.m..[47] The encirclement of this small archipelago may be justified on the basis of the archipelagic concept.

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[43] Another problematic aspect of the straight baseline system in the Sjaelland concerns the use of 6 basepoints in the sea and particularly basepoints 43, 44, 45, 46, 50 and 57. According to article 7 of the LOSC, the basepoints from which straight baselines will be drawn should be located either on islands or LTEs (under the conditions of article 7 (4)) and not in the sea.

[44] Sweden has objected the inclusion of the island of Hesselø to the straight baseline system; mentioned in U.Leanza, 'The Influence of Island on Delimitation in the Baltic Sea' in R.Platzoder & Ph.Verlaan (eds), *The Baltic Sea: New Developments in National Policies and International Cooperation* (Workshop) (M.Nijhoff Publ., 1997), p. 181.

[45] *Limits in the Seas, No. 19 Revised, Straight Baselines: Denmark*, p. 11. With regard to the compatibility of the straight baselines to the general configuration of the coast, the US contends that the straight baselines respect the configuration of the Sjaelland (and not of the mainland) and they do not deviate from the general coastal trend of the archipelago.

[46] The islands in the northern part of Kattegat are Anholt, Hirsholmane, Laesø, Nordre Rønner and Hornfiskøen.

[47] The longest segments are the ones joining basepoints 75-76: 8.92 n.m., 77-78: 7 n.m., 80-81 8.6 n.m. and 82-83 5.56 n.m..

4. Furneaux Group – Australia

The Furneaux Group is a group of 52 islands at the eastern end of the Bass Strait between Victoria in the southeastern part of Australia and Tasmania.[48] The main islands of the group are Flinders Island, Cape Barren Island and Clarke Island.

Australia has applied a system of 12 straight baselines in the east-south sector of the archipelago for the delimitation of the territorial sea.[49] The baselines used are relatively short and they join features which are located in close proximity to each other.[50]

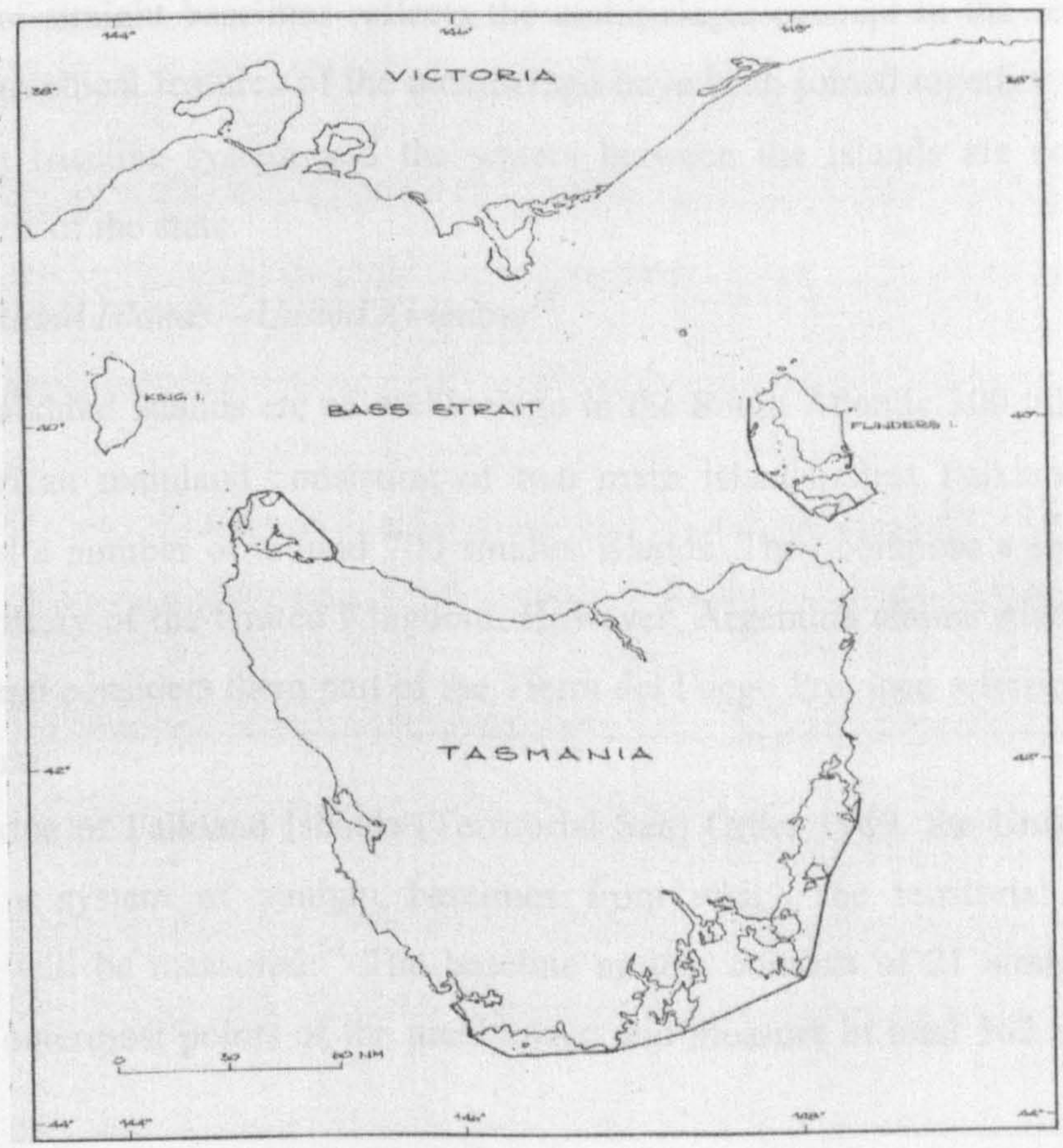

Figure 10

Source: Atlas of the Straight Baselines, G.Francalance, D.Romano. T.Scovazzi

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[48] The group is part of the state of Tasmania, one of the six states of Australia, with a local government.
[49] Proclamation of the inner limits (the baseline) of 4 February 1983. The Proclamation may be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/ STATEFILES/AUS.htm
[50] The total length of the baselines segments measures 61 n.m.; the shorter segment is just 0.91 n.m. and the longest one does not exceed 13 n.m..

Like the cases previously discussed, this archipelago may either considered as an outlying archipelago or as a mainland-type island fringed by a coastal archipelago. In the latter case, the Flinders Island may be deemed as composing the main island of the group having its western and southern coasts fringed by the other smaller islands of the group.[51] It is surprising, as observed by Prescott,[52] the fact that the baseline system has only been applied in the southern and eastern side of the island group and not in the northern part of it where the same conditions exist, that is, small islands are located in the immediate vicinity of the coast of the Flinders Island. Despite the fact that Australia has not united the smaller islands in the northern sector of the archipelago, the application of straight baselines reflects the archipelagic concept in the sense that the various geographical features of the archipelago have been joined together with the use of a straight baseline system and the waters between the islands are considered as internal waters of the state.

5. Falkland Islands – United Kingdom[53]

The Falkland Islands are an archipelago in the South Atlantic 300 miles from the South American mainland consisting of two main islands, East Falkland and West Falkland and a number of around 700 smaller islands. They compose a self-governing overseas territory of the United Kingdom. However, Argentina claims sovereignty over the islands and considers them part of the Tierra del Fuego Province referring to them as Islas Malvinas.

By virtue of Falkland Islands (Territorial Sea) Order 1989, the United Kingdom established a system of straight baselines from which the territorial sea of this archipelago will be measured.[54] The baseline system consists of 21 straight baselines joining the outermost points of the archipelago and measure in total 362 n.m. with the

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[51] J.R.V.Prescott, *Australia's Maritime Boundaries* (Canberra: Department of International Relations, The Australian National University, 1985), p. 67.

[52] *Ibid.*

[53] The UK is classified here as a continental state, despite the fact that it is composed entirely of islands, as it seems from the practice of this state (including its views expressed during UNCLOS III; the UK actually suggested the 1:1 minimum in the water-to-land ratio as a condition for the application of archipelagic baselines; GA Off.Rec., Vol. III, Annex II, Appendix V, Chapter 33, (originally issued as A/AC.138/SC.II/L.44), p. 99-100) that it considers itself as a continental-type state possessing outlying and coastal archipelagos.

[54] United Kingdom, Statutory Instruments, 1989, No. 1993. According to the explanatory note attached to the Order 'the effect of the Order is to establish around all of the Falkland Islands (including Beauchene Island) a territorial sea extending to 12 nautical miles from the appropriate baselines'.

longest baseline segments measuring 41 n.m. (basepoints 12-13) and 35 n.m. (basepoints 8-9).

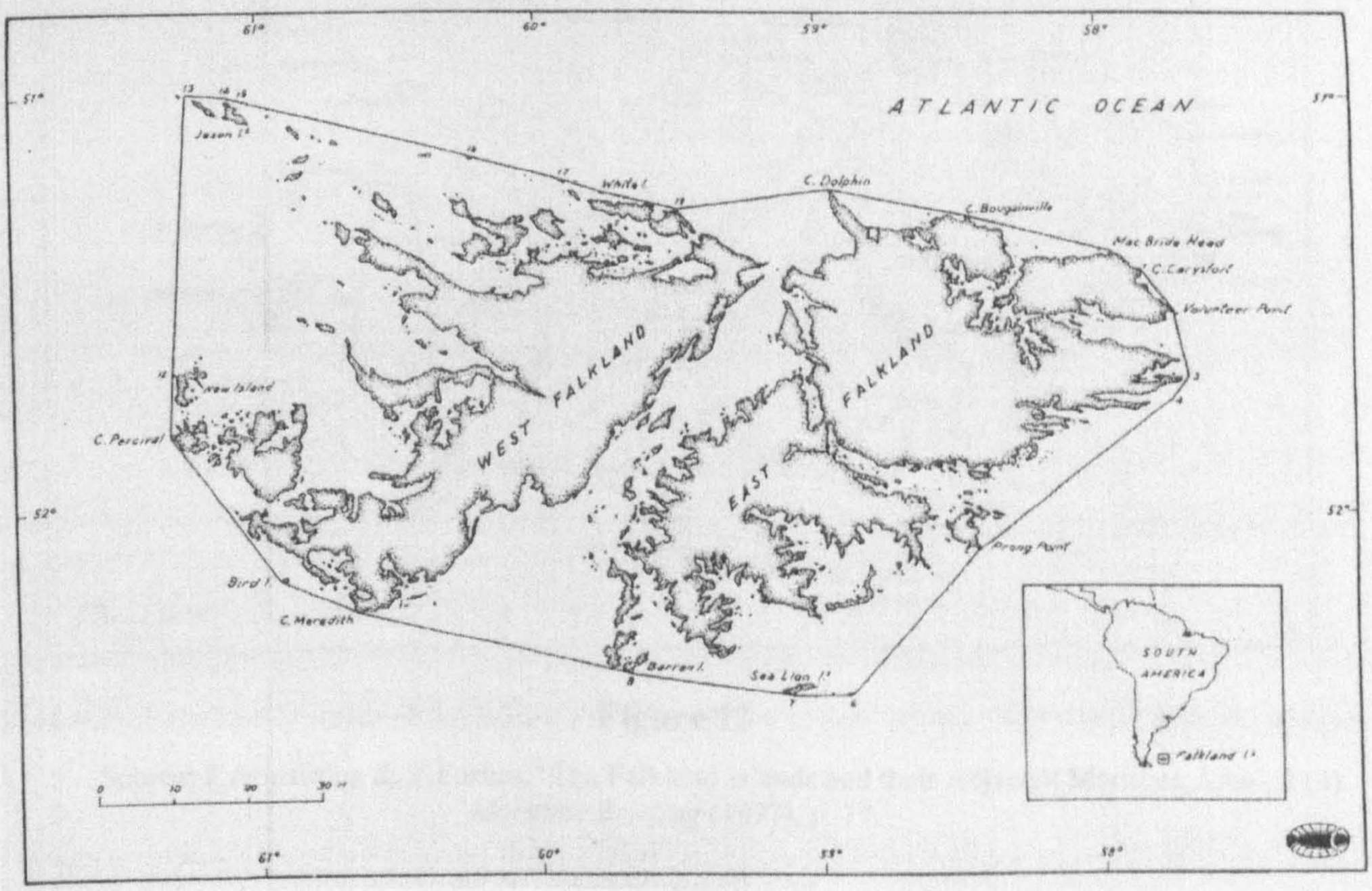

Figure 11

Source: Lines in the Sea, edited by G.Francalanci & Tullio Scovazzi

Argentina, which claims sovereignty over the islands, has also established a system of straight baselines for the delimitation of the territorial sea of the Islas Malvinas. By virtue of Act No. 23.968 of 14 August 1991[55], Argentina established two systems of straight baselines for the measurement of its 12-mile territorial sea. The first set of lines is drawn around the Isla Gran Malvina (West Falkland) and the adjacent islands consisting of 42 segments of straight baselines. The second is drawn around the Isla Soledad (East Falkland) and the adjacent islands consisting of 47 straight baselines. According to article 2 of the above-mentioned Act the waters landward of the baselines will be part of the internal waters of the country.

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[55] The Act can be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ARG.htm .

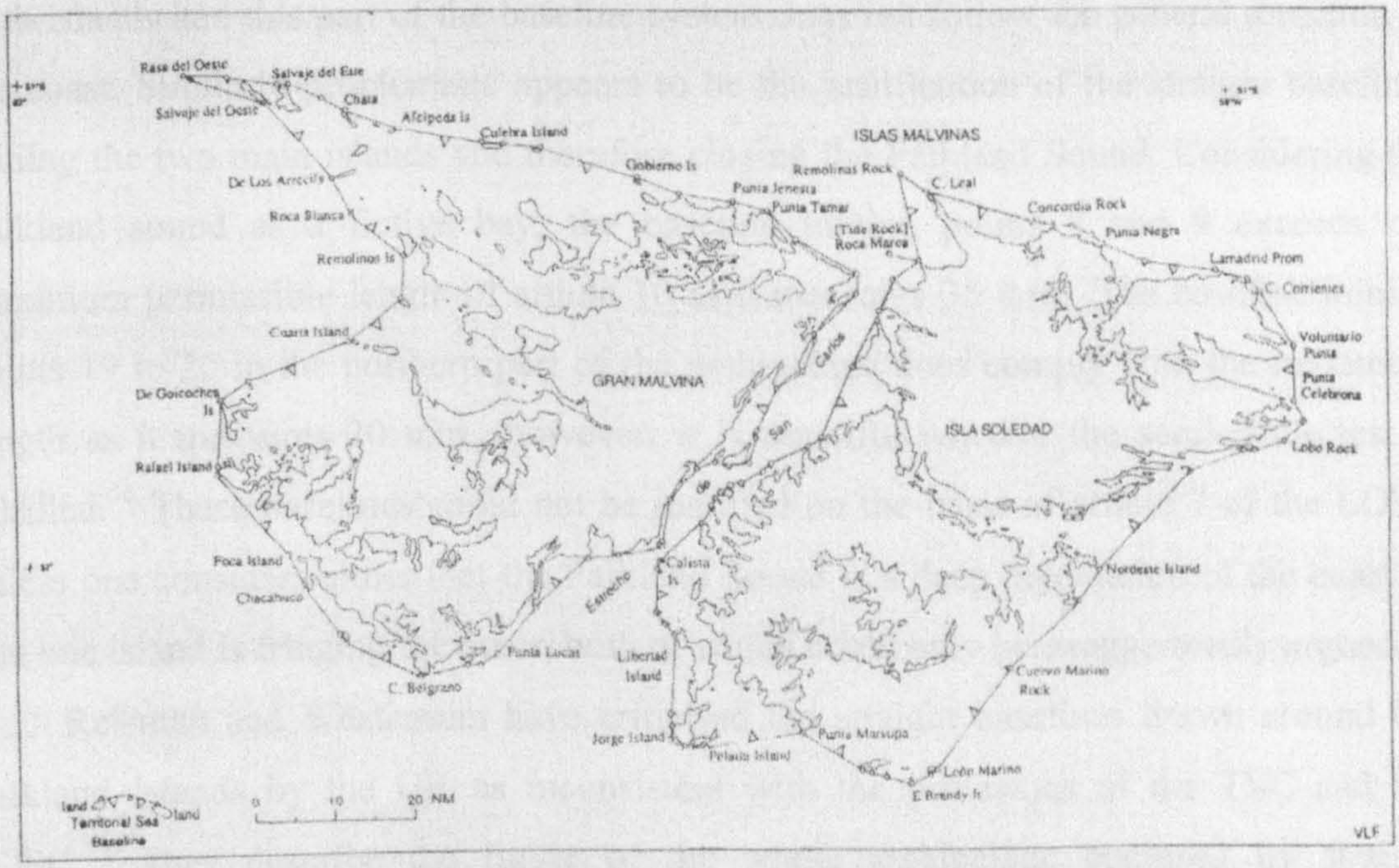

Figure 12

Source: P.Armstrong & V.Forbes, 'The Falkland Islands and their Adjacent Maritime Area', 2 (3) *Maritime Briefing* (1997), p. 17.

The Falkland Islands may be classified both as an outlying archipelago as well as two mainland-type islands fringed by coastal archipelagos. Looking at the systems applied both by the UK and Argentina, it may be said that the UK's intention was to treat the archipelago as an outlying one, joining its outermost points in a common straight baseline system, whereas Argentina has applied two separate straight baseline systems and does not treat thus the whole archipelago as a whole. Argentina seems to have been very cautious in applying article 7 of the LOSC regarding the existence of fringes of islands along the coasts of the two main islands, as she has used two different systems of baselines, considering parts of the Falkland Sound as territorial sea and not as internal waters.

Even in the case of the application of straight baselines by the UK, most of the segments of straight baselines drawn may be deemed as compatible to article 7 of the LOSC. The straight baselines surrounding the East Falkland seem justifiable on the basis of article 7 (basepoints 1 to 8) as indeed the coast of this island is deeply indented and cut into and there are some fringes of islands in the immediate vicinity of the coast. The straight baselines in the western side of the archipelago seem, however, problematic. The coast of the Western Falkland is similarly fringed with islands but the straight baseline joining segments 12-13, which measures 41.3 n.m. encloses an area not studded

with islands and this part of the baseline system does not follow the general direction of the coast. Similarly problematic appears to be the justification of the straight baselines joining the two main islands and therefore closing the Falkland Sound. Considering the Falkland sound as a fictive bay, the baseline joining points 8 and 9 exceeds the maximum permissible length of article 10 as it measures 35 n.m.. The baseline joining points 19 to 20 in the northern part of the archipelago does comply with the maximum length as it measures 20 n.m., however, it is doubtful whether the semi-circle test is fulfilled.[56] These baselines could not be justified on the basis of article 7 of the LOSC unless one considers either that the Falkland Sound is a deep indentation of the coast or that one island is fringing the other, both of which could only be exaggeratedly argued.

Reisman and Westerman have criticised the straight baselines drawn around the Falkland Islands by the UK as inconsistent with the provisions of the TSC and the LOSC.[57] They describe the figure of the whole archipelago enclosed by straight baselines as a 'pregnant rectangle' whose sides would be inconsistent with article 47 (2) with regard to the permissible length of the straight baselines.[58] In their perception the notion of 'baselines' mentioned in article 47 (2) does not refer to each different baseline segment but to the aggregation of the segments to a baseline in each side of the archipelago. However, article 7 does not provide for a maximum length of the straight baselines whereas article 47 (1) which prescribes a maximum of 100 n.m. refers to the length of archipelagic baselines, which would normally be the baseline joining two basepoints. In the case of the Falkland Islands the longest straight baseline (joining basepoints 12-13) is 41.2 n.m.

6. Guadeloupe – France

Guadeloupe is an archipelago in the eastern Caribbean Sea consisting of the islands Basse-Terre, Grande-Terre (separated from Basse-Terre by a narrow sea channel), La Desorade, Iles de la Petite Terre, Marie-Galante and Iles des Saintes (2 islands). St Barthelemy with the closely located surrounding islets of Ile Coco, Petits Saints, Pain de Sucre, Le Boulanger, Ile Chevreau, Ile Fregate, Ile Toc Vers, Les

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[56] This would raise questions regarding which water area should be measured for performing the semi-circle test; measuring the water area indentation till the point where the Sound begins would not satisfy the semi-circle test. Including the area of the sound up till the point where narrow passages are created between the two islands would not conform to the idea of a bay. See however the analysis regarding the Long Island Sound, Chapter 2, p. 106.
[57] W.M.Reisman & G.S.Westerman, (1992), p. 163, fnt 93.
[58] *Ibid.*

Grenadin and La Tortue compose a small group of islands in the north of Guadeloupe. Guadaloupe composes a 'Département et Région d'outre Mer'. St Martine and St Barthelemy, previously parts of Guadeloupe, have recently acquired new status as 'Collectivités d'outre Mer'.[59]

Decree 99-324 of 21 April 1999[60] provides for a system of straight baselines for the delimitation of the maritime zones of Guadeloupe consisting of 17 points joining together in the north of the archipelago the islands of Grande-Terre and Basse-Terre and in the south the fore-mentioned islands with the smaller islands of Grande Anse, Iles des Petite Terres, Marie Galante and the Iles des Saintes. The longest baseline segments are 18.7 n.m. (joining basepoints O-P in the north part of the group), 17.8 n.m. (joining basepoints F-G) and 16.4 n.m. (joining basepoints D-E).

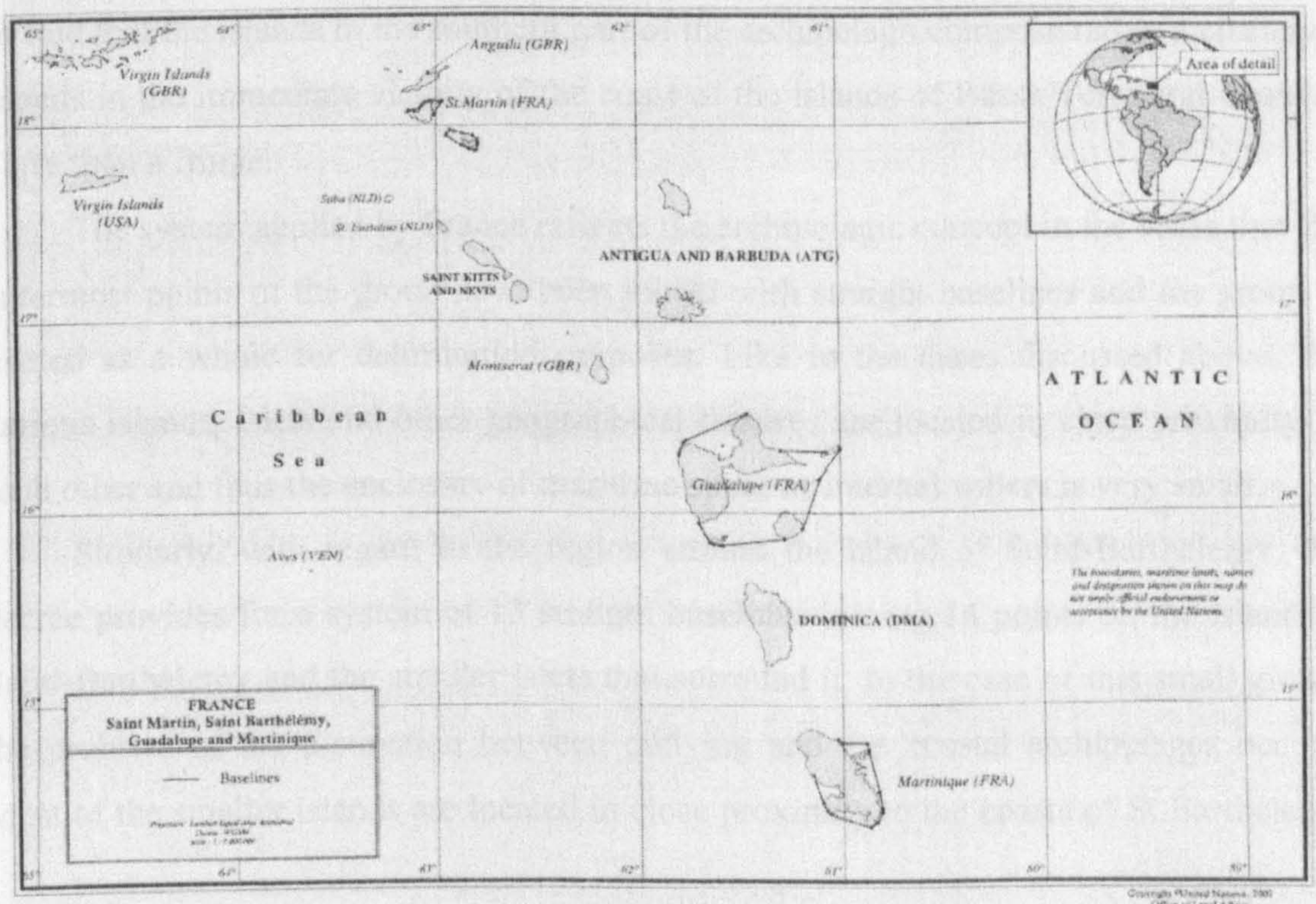

Figure 13

Source: Law of the Sea Bulletin, No. 50, (New York, UN Publ. 2003), p. 30.

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[59] Loi organique No 2007-223 (21 février 2007). The island of St Martin is divided in two parts with France exercising sovereignty over the western part and the Netherlands over the eastern part.
[60] The Decree may be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/FRA.htm.

While Guadeloupe may be without doubt classified as an outlying archipelago, the position of the islands may justify the application of straight baselines on the basis of a liberal interpretation of article 7.[61] Given that the islands of Basse Terre and Grande Terre (which are connected with a drawbridge) compose the mainland of article 7, it may be argued that the islands of Les Saintes, Marie-Galante, Petite Terre and La Desirade, compose a 'fringe of islands along the coast'.[62] It should be, however, noted that this would necessitate a very flexible interpretation of article 7 in order to consider them as a 'fringe'. Indeed, this flexible interpretation may find some support in state practice, where states are in general very 'lenient' with the determination of a fringe of islands; however, other states have not supported such interpretation of determining a fringe, and neither has the ICJ; particularly, the ICJ in the *Qatar-Bahrain case* made a distinction between a cluster and a fringe of islands concluding that only in the latter case could straight baselines on the basis of article 7 be applied.[63] In this respect, it could be said that the islands in the southern part of the archipelago compose rather a cluster of islands in the immediate vicinity of the coast of the islands of Basse-Terre and Grande-Terre than a fringe.

The system applied by France reflects the archipelagic concept in the sense that the outermost points of the group have been joined with straight baselines and the group is treated as a whole for delimitation purposes. Like in the cases discussed above, the various islands, islets and other geographical features are located in close proximity to each other and thus the enclosure of maritime space as internal waters is very small.

Similarly, with regard to the region around the island of Saint-Barthelemy, the decree provides for a system of 13 straight baselines joining 14 points on the island of Saint-Barthelemy and the smaller islets that surround it. In the case of this small group, the problem of the distinction between outlying and the coastal archipelagos occurs. Most of the smaller islands are located in close proximity to the coasts of St Barthelemy

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[61] In the north side of the archipelago the straight baseline joining the two main islands of Basse-Terre and Grande-Terre (basepoints O-P), which measures 18.72 n.m., may be considered as a line closing a 'fictive bay', (due to the proximity of the islands and the existence of a bridge joining them) (mentioned in J.I.Charney, L.M.Alexander, *International Maritime Boundaries* (Dordrecht: Martinus Nijhoff Publ., 1993), p. 709 (on the Agreement on Maritime delimitation between the government of Dominica and the government of the French Republic); however, the semi-circle test does not seem to be fulfilled (article 10 (2) of the LOSC).

[62] The longest baseline segment is the one joining the island of Marie-Galante and the Grand Ilet in the group of Iles des Saintes which measures 17.9 n.m. (basepoints F-G). The second longest joins the Iles de law Petite-Terre with a basepoint at the eastern side of Marie-Galante and measures 16.45 n.m. The rest of the baselines in the southern part of the archipelago do not exceed 11 n.m.

[63] *Qatar/Bahrain case*, para. 214; see also the analysis in Chapter 2, p. 86.

(indeed the longest baseline used measures no more than 5 n.m. (basepoints F-G)) and may thus be considered as composing a fringe in proximity to its coast. The encirclement of the whole group though does reflect the archipelagic concept. Due to the close proximity of the islands the maritime space internalised is very small.

The Decree also establishes a straight baseline system in the French part of the island of St Martin consisting of 11 baselines most of which join basepoints on the coast of this island. However, segments H-I and L-M join the coast of St Martin and a closely located small isle and measure 4.4 and 1.82 n.m. respectively. The joining of these two islands in a common straight baseline system may be deemed to reflect the archipelagic concept. Article 7 of the LOSC is inapplicable as there is no fringe of islands but one island close to the coast of another.

The status of the enclosed waters is not specified but since the territorial sea is measured from the straight baselines according to Law No. 71-1060 of 14 December 1971 regarding the delimitation of the French territorial waters,[64] it is obvious that France considers the enclosed waters to be internal waters. However, there is no provision recognising the right of innocent passage in the internal waters.[65]

3.2.2 Archipelagos with similarly sized islands or with islands located in a random way

These archipelagos have as a common element the fact that the islands pertaining to the group are either similarly sized or are located randomly in a maritime area. These attributes make the fulfilment of the conditions of article 7 regarding the existence of a fringe of islands in the immediate vicinity of a coast difficult. In the category of similarly sized islands, like in the cases of the Faroes, Galapagos, Houtman and Abrolhos, Azores, Madeira, Balearic Islands, Canary Islands, Christiansø , Kong Karls Land Islands (Svalbard), Loyalty Islands, Paracel Islands, there is no dominating due to its size island which could be considered as composing the mainland of article 7 and the random order of the islands precludes the existence of a fringe (see for example the Turks and Caicos). Therefore, in these cases even a flexible interpretation of article 7 of the LOSC could not justify the baselines systems used.

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[64] The text of the Law may be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/FRA.htm.

[65] By virtue of Decree No. 85/185 of 6 February 1985 the right of innocent passage is recognised in favour of foreign vessels in the territorial sea. The text of the fore-mentioned decree may be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/FRA.htm.

Another matter that should be mentioned concerns the distinction of archipelagos on the basis of the distance between the islands, as referred to in the introduction of this Chapter. It was stated therein that geography has played a role in the systems applied by continental states to their outlying archipelagos. With the only exception of the Paracel Islands and the straight baseline system applied in this archipelago by China, all the other archipelagic formations in which straight baselines systems have been applied are composed of islands located in close distance to each other.[66] Some of the systems have been applied in small groups composed of two[67] or three islands.

In the following subsection, the legislation according to which straight baseline systems have been applied to outlying archipelagos is analysed with an emphasis on the conditions for such application. It should also be pointed out that these states have not proclaimed these systems as an analogical application of the archipelagic regime of the LOSC. The legal basis is not entirely clear and this will be more thoroughly explored in Chapter 4, but it may be said that these states seem to be relying on the application of the straight baseline concept (in a broader form that that embodied in article 7 of the LOSC) to groups of islands.

1. Galapagos Islands - Ecuador

The Galapagos Islands constitute an archipelago of 17 volcanic islands[68] and associated islets and rocks located in the Eastern Pacific ocean about 600 miles west of the coast of Ecuador. Due to the vast number of endemic species, the Galapagos Islands were declared a national park in 1959 and in 1986 the surrounding ocean was declared a marine reserve. In 1978 UNESCO recognised the islands as a World Heritage Site and in December 2001 the recognition was extended to include also the marine reserve.[69] Due to the vulnerability of the archipelago, the Galapagos Islands were designated in 2005 as a Particularly Sensitive Sea Area (PSSA) by the IMO.[70]

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[66] Another exception would be the northern sector of the Galapagos archipelago; see *infra*, p. 140.
[67] Two-island groups may be validly regarded as archipelagos in the legal sense; see Introduction, note 21.
[68] The islands forming the archipelago are the following: San Cristobal, Espanola, Santa Fe, Genovesa, Santa Maria, Santa Cruz, Baltra, Marchena, Pinzon, Rabida, Bartolome, Santiago, Pinta, Isabela, Fernandina, Wenman (Wolf), Darwin (Culpepper). See http://islands.unep.ch/CKC.htm.
[69] See the UNESCO's website at http://whc.unesco.org/pg.cfm?cid=31&id_site=1.
[70] MEPC.135(53) Designation of the Galapagos Islands as Particularly Sensitive Sea Area, adopted on 22 July 2005 (MEPC 53/24/Add.1/Annex 23). At the request of the Government of Ecuador, the Maritime Safety Committee of the IMO adopted Resolution A.976 (24) (1 December 2005) establishing an area to be avoided in the Galapagos archipelago and Resolution MSC.229 (82) (5 December 2005) establishing a mandatory ship reporting system in the archipelago. Ecuador also notified the MSC with regard to the implementation of two traffic separation schemes for ships entering the ports of the Galapagos archipelago; NAV52/3, March 2006.

In a series of Decrees – the first enacted in 1934 – Ecuador treated the archipelago as a whole for the measurement of the territorial sea. The first claim of Ecuador in the Galapagos Islands was raised in 1934 when the government issued a fishery regulation declaring the Galapagos Islands to be a Fish and Game Preserve and National Park with a territorial sea of fifteen miles around the whole archipelago, in which fishing was declared prohibited for foreign vessels.[71] Similarly, in 1938 by a new fisheries decree, foreign vessels were prohibited from entering the territorial waters of Ecuador which were defined according to article 2 of the Decree with regard to the Galapagos Islands as the waters 'within 15 miles measured from low-water mark at the most prominent points of the islands which mark the outer bounds of the archipelago of Colon'.[72]

In a similar way the Presidential Decree of 22 February 1951 considered the Galapagos Islands as a unit for the delimitation of the territorial sea and for the regulation of fishing within this zone. Particularly, in article 2 of this Decree Ecuador declared that 'for the purpose of sea fishing and hunting in general the territorial waters of the Republic will be considered to comprise 12 nautical miles, measured from the line of the lowest tide *at the extreme points of the furthest islands* (emphasis added) forming the Colon archipelago'.[73] Despite the fact that no specific baselines were defined in the Decree, it is certain that Ecuador considered that the Galapagos Islands should be viewed as whole with a territorial sea encircling the entire archipelago.[74]

Ecuador specified the exact straight baselines used for the measurement of the territorial sea in a Decree in 1971, according to which the territorial sea of the Colon Archipelago (Galapagos Islands) will be measured from straight baselines joining particular points on the coasts of the outermost islands of the group.[75] The longest

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[71] UN Legislative Series ST/LEG/Ser.B/6, p. 478-481, especially articles 74 and 78. Article 78 provides that 'for fishing purposes, territorial waters are considered to be those within an area of 15 miles measured from the low water mark at the most salient points of the islands.

[72] See also S.A.Riesenfeld, *Protection of Coastal Fisheries in International Law* (Washington: Carnagie Endowment for International Peace, 1942), p. 243-4. Riesenfeld cites the original Spanish text of the decree and provides its translation in English. Evensen mentions also the Presidential Decree of 2 February 1938 concerning Fisheries; J.Evensen, (1958), p.298

[73] UN Legislative Series, Doc. ST/LEG/SER.B/6, p. 487; the UN provided a French translation of the original Spanish text of the Presidential Decree. The English translation cited above is from D.P.O'Connell (1971), p. 23. Presidential Decree No. 1085 of 14 May 1955 contained a similar provision; UN Legislation Series, Doc.ST/LEG/SER.B/6, p. 490.

[74] *Limits in the Seas, No. 42: Straight Baselines: Ecuador* (US Department of State, Office of the Geographer, Bureau of Intelligence and Research, May 1972), p. 3.

[75] Supreme Decree No. 959-A of 28 June 1971, article 1 (II); the Decree can be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/ STATEFILES/ECU.htm; The 8 straight baselines join the islands of Darwin, Genovesa, San Cristobal, Espanola, Santa Maria, Isabela and Fernandina.

segment is the straight baseline joining the island Fernandina to the island of Darwin in the western sector of the archipelago, which measures 124 miles.[76] The second longest is the straight baseline joining the Island of Darwin with the island of Pinta, which measures 95 miles. The total length of the straight baselines used around the Galapagos archipelago is 552 miles while the average length measures 69 miles.[77]

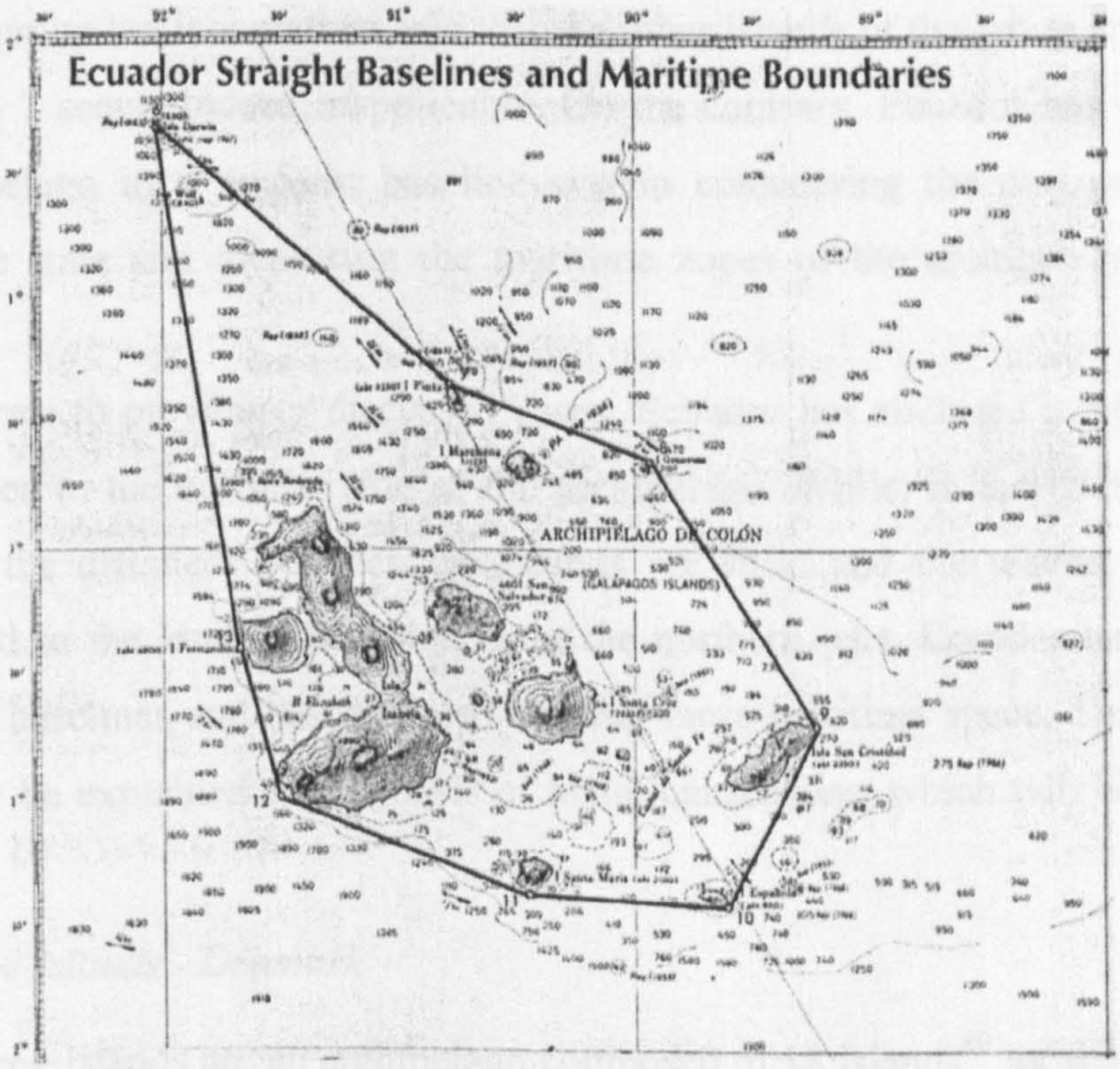

Figure 14

Source: Limits in the Seas No. 42 Straight baselines: Ecuador (US State Department, Office of the Geographer, 1972)

Article 2 of the above-mentioned Supreme Decree prescribes that the waters between the lines and the coasts of the islands will constitute internal waters.[78] There is

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[76] *Limits in the Seas No. 42*, p. 5. It should be noted that this particular baseline segment would not conform to the conditions regarding the length of archipelagic baselines (article 47 (2) of the LOSC).
[77] *Ibid.*
[78] *Ibid.* By article 628 of the Civil Code as amended by Decree No. 256-CLP of 27 February 1970 it is also provided that 'the adjacent sea between the baseline referred to in the preceding paragraph and the low-water mark shall constitute internal waters and be part of the national domain'. The text can be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/ STATEFILES/ECU.htm.

no provision regarding the granting of the right of innocent passage to vessels of foreign states.

Reisman and Westerman have criticised the baseline system applied by Ecuador in the Galapagos Islands on the basis of its being incompatible to article 4 of the TSC (article 7 of the LOSC) as the Galapagos cannot be considered to compose a fringe of islands in the immediate vicinity of the mainland coast.[79] Isabela Island is the largest island of the group but it cannot be said that the other islands of the group are fringing its coast. Article 7 seems indeed inapplicable. On the contrary, Ecuador has encircled the whole archipelago in a uniform baseline system considering the enclosed waters as waters of the state and measuring the maritime zones of the archipelago from these baselines.

In contrast to previously discussed cases, Ecuador has enclosed a relatively large maritime space in the northern side of the archipelago. While, in the south part of the archipelago, the distances between the islands are short and the waters enclosed are closely linked to the land of the islands, in the northern part, Ecuador has drawn two long straight baselines and has enclosed a rather large maritime space. This practice of Ecuador may be explained on the basis of historical reasons, which will be analysed in Chapter 4.

2. Faroe Islands - Denmark

The Faroe Islands are an archipelago composed of 18 islands[80] located between the Norwegian Sea and the North Atlantic Ocean.[81] The Faroe Islands are a self-governing overseas administrative division of Denmark since 1948.

Denmark first raised its archipelagic claim in the Faroe Islands in 1903, when it proclaimed that the zone of 3 n.m. reserved exclusively for fishing for Danish Nationals would be measured from 'the outermost line along which the land is dry at low tide throughout the extent of the coasts of the islands together with the islets, rocks and

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[79] W.M.Reisman & G.S.Westerman (1992), p. 156.
[80] The islands comprising the archipelago are the following: Bordøy, Eysturøy, Fugløy, Hestur, Kalsøy, Koltur, Kunøy, Litla Dimun, Mykines, Nolsøy, Sandøy, Skuvøy, Stora Dimun, Streymøy, Sudurøy, Svinøy, Vagar, Vidøy. The only uninhabited island is Litla Dimun.
[81] See http://www.cia.gov/cia/publications/factbook/geos/fo.html.

shoals appurtenant thereto'.[82] A similar provision was included in an Order in 1955 regarding the supervision of fisheries around the archipelago.[83]

In a Decree enacted in 1963, the Danish government established a straight baselines system around the archipelago from which a zone of 12 nautical miles where only Faeroese and Danish nationals would be authorised to engage in fishing would be measured.[84]

By virtue of Ordinance No. 599 of 21 December 1976 Denmark delineated the Territorial Sea around the Faroe Islands determining the exact straight baselines from which the territorial sea would be measured. [85] The system applied by Denmark consists of 10 straight baselines joining 11 points on the outermost islands and reefs of the Faroe archipelago. The longest segment of this system is the straight baseline in the east side of the archipelago joining point 10 (E-most point of Bispen E of Fuglø) with point 11 (E-most point of island group Munken), which measures around 61 n.m and encloses the bight called Gutta Grynna.[86] The second longest straight baseline measuring 41 n.m. joins point 2 (W-most point of the island of Knopur near Famara) to point 3 (W-most point of island W of Myggenaes Lighthouse) and at its farthest distance from the mainland is 7.5 nautical miles.[87] All the other straight baselines are much shorter in length.

The waters enclosed by these straight baselines have the status of internal waters of the state.[88]

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[82] Order No. 29 of 27 February 1903 respecting the supervision of Fisheries in the Sea surrounding the Faroe Islands and Iceland outside the Danish Territorial Sea, UN Doc. ST/LEG/SER.B/6, p. 467-8.
[83] Order of 20 May 1955 which amended the 1903 Decree regarding the supervision of Fisheries in the Sea surrounding the Faroe Islands; UN Doc. ST/LEG/SER.B/6, p. 468.
[84] Decree No. 156 of 24 April 1963 amending the Decree Respecting the fishery Patrol in the seas surrounding the Faroe Islands found at *Limits in the Seas, No. 13, Straight Baselines: The Faeroes* (US Department of State, Office of the Geographer, Bureau of Intelligence and Research, December 1970), p. 1-2. The Decree provided for the use of 12 straight baselines joining specific points on the coasts of the islands surrounding the whole archipelago.
[85] The Ordinance may be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/DNK.htm.
[86] J.R.V.Prescott, *The Maritime Political Boundaries of the World* (1985), p. 261. The longest distance between this straight baseline and the nearest land is 12.5 miles.
[87] *Ibid.*
[88] According to paragraph 1 subsection (3) of Ordinance 599 of 21 December 1976 the internal waters of the archipelago 'shall consist of water areas such as harbours, harbour entrances, roadstead, bays, fjords, sounds and belts which are situated within the baselines set out in section 2'.

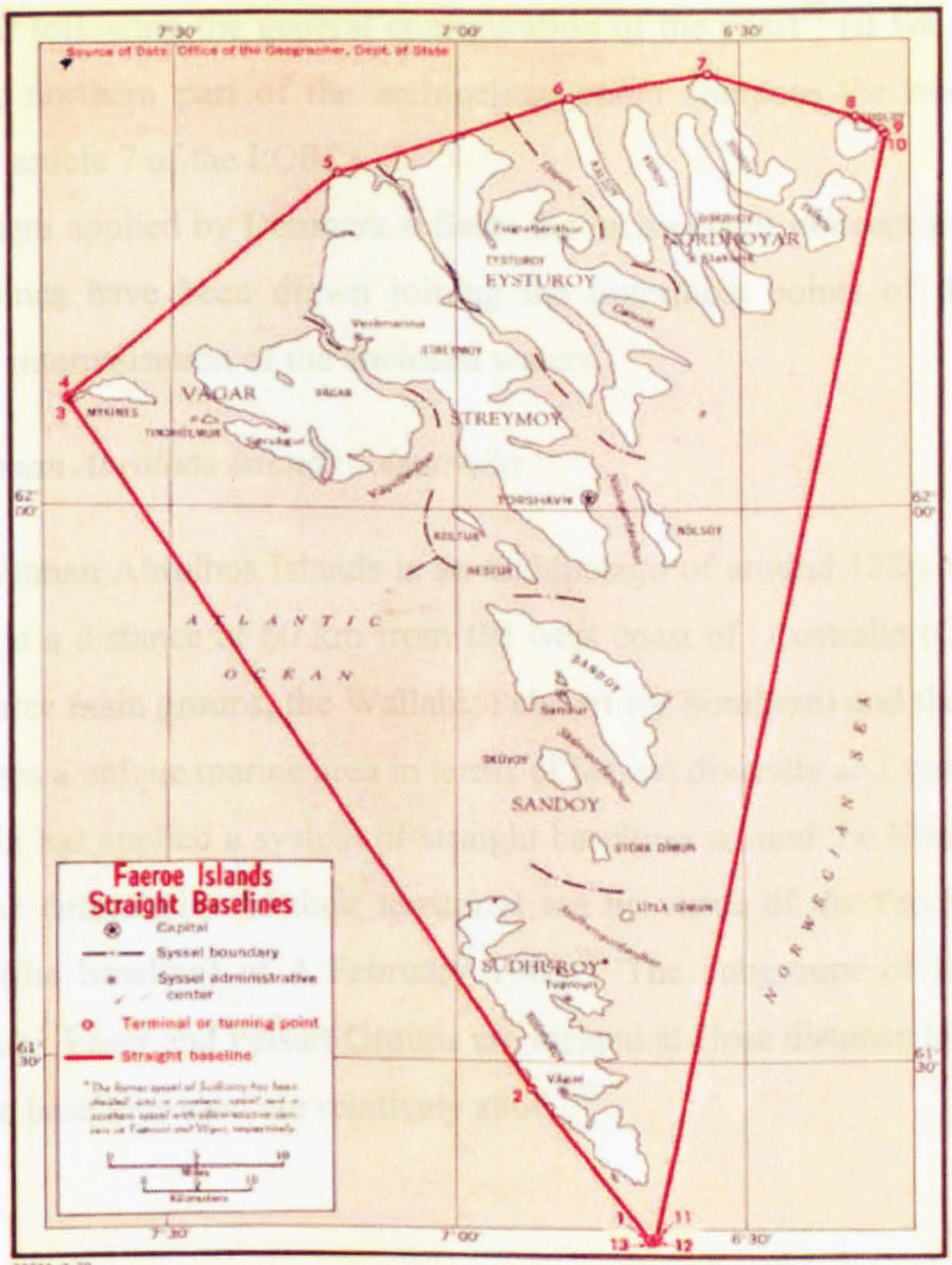

Figure 15

Source: Limits in the Seas, US State Department, No. 13: Straight baselines: The Faeroes

There are some parts of the archipelago where the application of straight baselines on the basis of article 7 of the LOSC seems justifiable. Particularly, the baselines joining basepoints 5 to 7 do meet the conditions stipulated by article 7 as the various islands at this side of the archipelago create deep indentations like the fjords of a mainland coast. The same, however, cannot be said for the rest of the baselines, particularly in the south of the archipelago where the islands are randomly located – though in a distance admittedly close to each other.[89] The somehow linear configuration of the islands

[89] The length of the baselines in the west and east of the archipelago (which has been criticised as exorbitantly long) measure 43 n.m. (basepoints 2-3) and 61 n.m. (basepoints 10-11) respectively but the islands which are enclosed by these baselines are located in close proximity to each other not exceeding 5 n.m.. In the commentary of the above Decree the US State Department pointed out that the Faeroese straight baselines were based on the 'so-called archipelago principle, which is not recognised in international law'; *Limits in the Seas, No. 13: Straight baselines: The Faeroes,* p. 3.

precludes their following the general configuration of the coast[90] (if we accept that the islands in the northern part of the archipelago could compose the mainland for the application of article 7 of the LOSC).

The system applied by Denmark reflects the archipelagic concept in the sense that straight baselines have been drawn joining the outermost points of the archipelago leading to the internalisation of the enclosed waters.

3. Houtman Abrolhos Islands - Australia

The Houtman Abrolhos Islands is an archipelago of around 122 coral islands and reefs located at a distance of 60 km from the west coast of Australia (Geraldton). It is made up of three main groups, the Wallabi, Pelsaert (or Southern) and the Easter groups and it composes a unique marine area in terms of habitat diversity and species richness.

Australia has applied a system of straight baselines around the Houtman Abrolhos Islands for the delimitation of their territorial sea by virtue of the Proclamation of the inner limits (the baseline) of 4 February 1983.[91] The subgroups of the archipelago, namely Wallabi, Easer and Pelsart Groups are located at close distance to each other and so most of the baselines used are relatively short. [92]

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[90] Prescott has observed that the segments joining basepoints 2 and 3 (that is the island of Knopur (in the south of the archipelago) to the island of Mykines) and points 10 and 11 (the island of Fugloy to the island of Munken) do not follow the general direction of the coast; J.R.V.Prescott, *The Maritime Political Boundaries of the World* (1985), p. 261.

[91] See *supra* note 49.

[92] The total length of the straight baselines used measure 81 n.m. with the two longest baselines measuring 17.7 n.m. and 13.5 n.m..

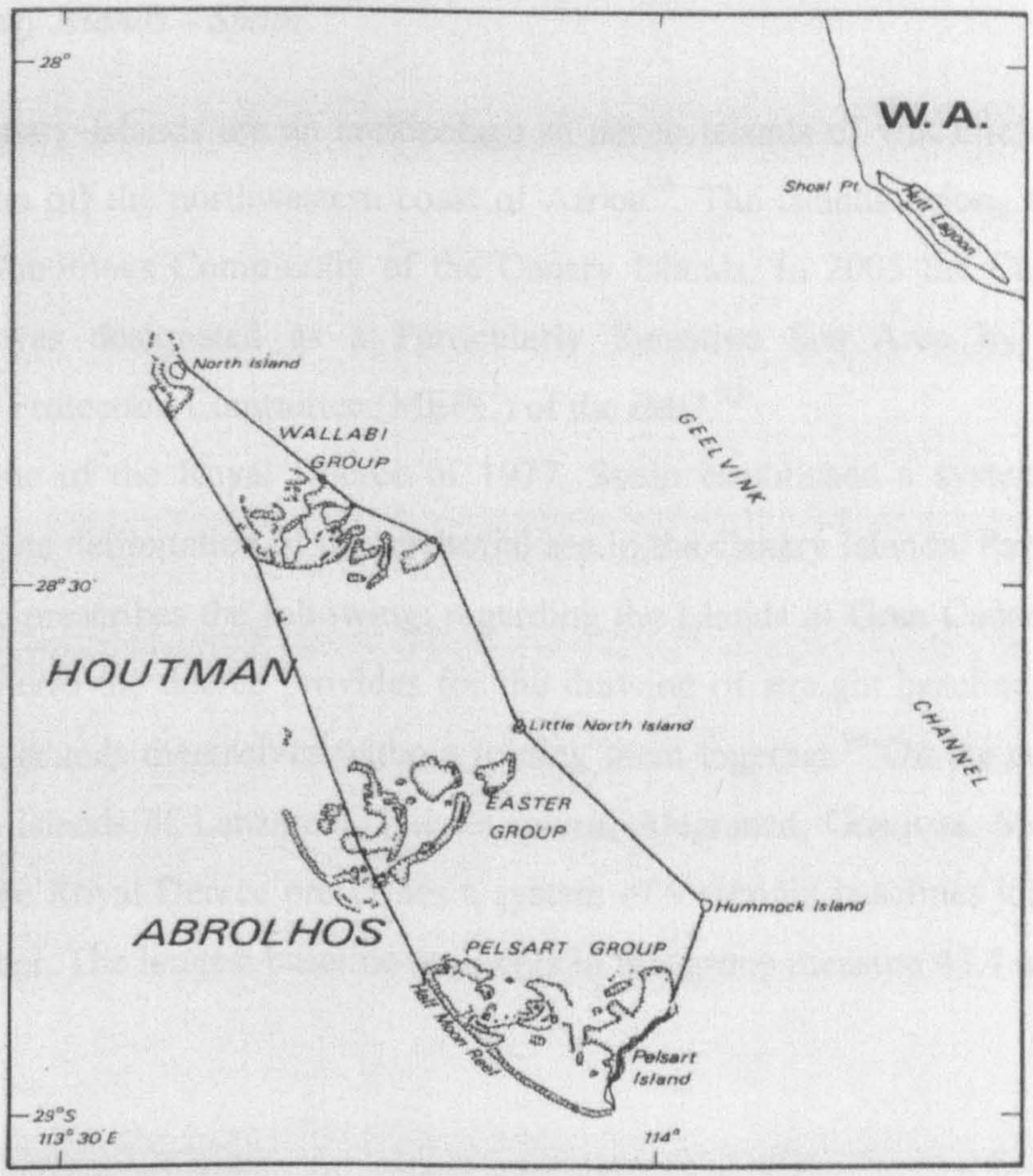

Figure 16

Source: Australia's Maritime Boundaries, J.R.V.Prescott.

With regard to the application of article 7 of the Territorial Sea Convention in the case of this archipelago, Prescott remarks that 'this baseline can only be justified if it is considered that the islands of two of the groups may be considered to fringe the third group. The Wallabi group has the largest area above the high-water line and therefore it should be considered to possess the coast, which is fringed with islands. It is difficult to argue that Easter Group fringes the Wallabi Group and entirely impossible to argue that the Pelsart Group fringes the Wallabi Group. Perhaps it is considered that the Pelsart Group fringes Easter Group but it seems hard to argue that islands which themselves form a fringe may also be fringed by smaller islands'.[93] The straight baseline system applied by Australia does reflect the archipelagic concept, as the outermost points of the archipelago are joined in a common straight baseline system with the enclosed waters treated as internal waters of the state.

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[93] J.R.V.Prescott, *Australia's Maritime Boundaries* (1985), p. 67

4. Canary Islands – Spain

The Canary Islands are an archipelago of seven islands of volcanic origin in the Atlantic Ocean off the northwestern coast of Africa[94]. The islands belong to Spain and form the Autonomous Community of the Canary Islands. In 2005 the Canary Islands archipelago was designated as a Particularly Sensitive Sea Area by the Marine Environment Protection Committee (MEPC) of the IMO.[95]

By virtue of the Royal Decree of 1977, Spain established a system of straight baselines for the delimitation of the territorial sea in the Canary Islands. Particularly, the Royal Decree prescribes the following: regarding the islands of Gran Canaria, Tenerife, Palma and Hierro the decree provides for the drawing of straight baselines connecting points on the islands themselves without joining them together.[96] On the contrary, with regard to the islands of Lanzarote, Fuerteventura, Alegranza, Graciosa, Montana Clara and Lobos, the Royal Decree prescribes a system of 9 straight baselines joining these 6 islands together. The longest baseline segments in this group measure 43.4 and 23 n.m.[97]

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[94] The islands forming the archipelago are the following: Gran Canaria, Tenerife, Lanzarote, La Palma, La Gomera, El Hierro and Fuerteventura.

[95] MEPC.134 (53) Designation of the Canary Islands as PSSA, adopted on 22 July 2005 (MEPC 53/24/Add.1/Annex 22). The following associated measures have been adopted: designation of five areas in the Canary archipelago as areas to be avoided (SN.1/Circ.253, 26 May 2006); establishment of a mandatory ship reporting system (Resolution MSC. 213 (81) adopted on 12 May 2006).

[96] In these cases Spain used as basepoints not only points on the coast of each of the islands but also rocks located in a very close distance to the coast. Particularly, with regard to Gran Canaria the basepoints of the baselines are apart from the coast of this island, also on the rocks El Roque, Roque de Melenera, Roque Arinaga and Isla de la Aldea, with regard to Tenerife also on the coast of Roques de Anaga and Roque Bermejo and finally with regard to Hierro also on the coast of Roques de Salmor.

[97] These baseline segments join the following basepoints: Punta de la Ensenada to Punta Grieta (Alegranza) and Punta Lima to Punta del Tarajalillo.

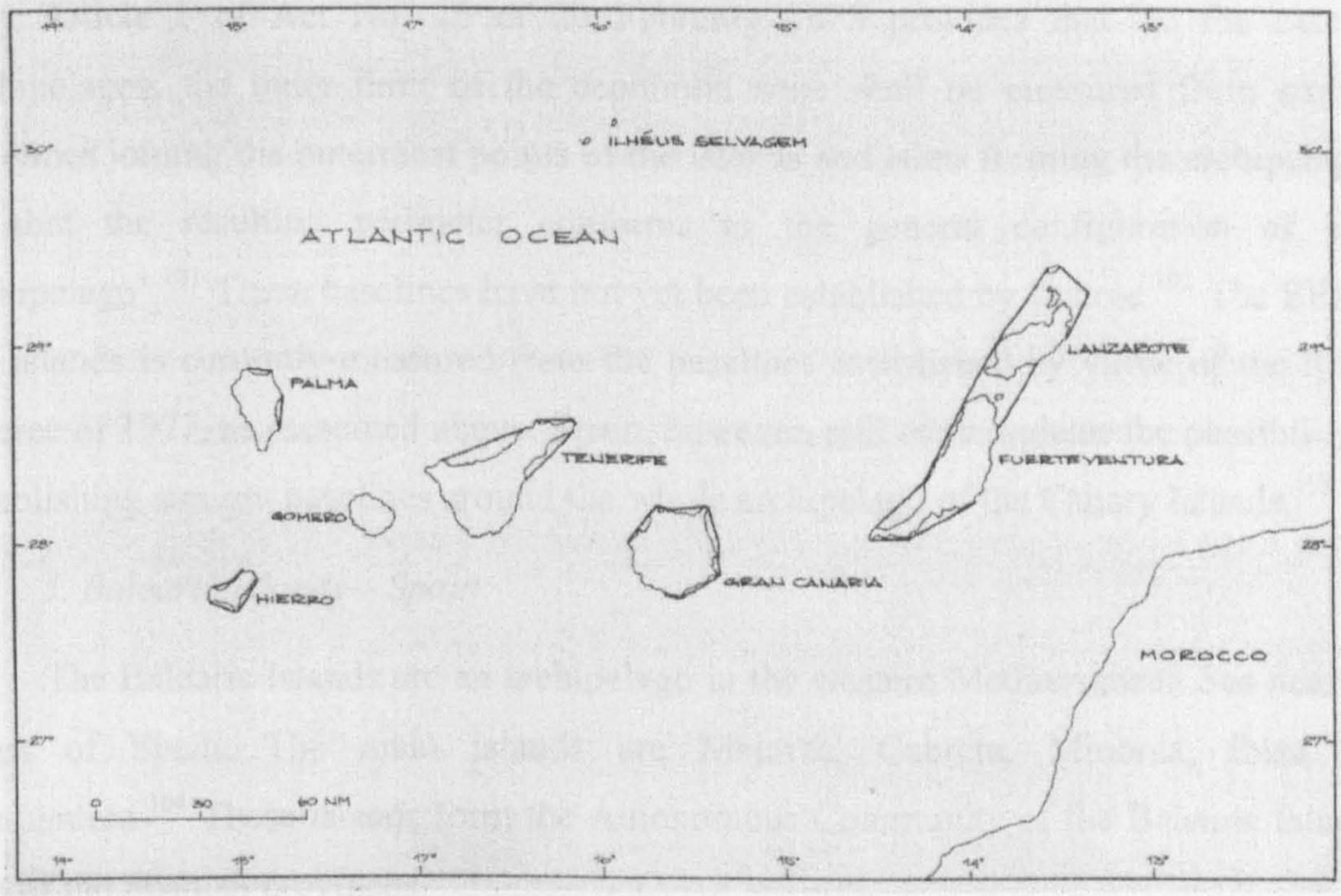

Figure 17

Source: Atlas of the Straight Baselines, Part I, edited by G.Francalanci, D.Romano & T.Scovazzi

It is not clarified in the Royal Decree of 1977 what is the status of the enclosed waters. However, from articles 1 (1) and 2 of Act No. 10 of 4 January 1977, it is evident that Spain considers the waters landward of the straight baselines as internal waters.[98]

Spain has not applied a straight baseline system to the whole of the archipelago but despite the cautious application of straight baselines in the subgroup of islands in the eastern part of the archipelago, in the sense that the islands are located in close proximity and thus the enclosure of waters is only marginal, the straight baselines cannot meet the requirements prescribed by article 7 of the LOSC. Fuerteventura is the larger island of the group but the linear configuration of the group precludes any possibility that the other islands compose a fringe in the immediate vicinity of its coasts.[99] The encirclement of the archipelago with straight baselines reflects the archipelagic concept.[100]

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[98] Article 2 of the Act provides that 'the inner limit of the territorial sea shall be determined by the low-water line and by such straight baselines as may be established by the Government'. The Act can be found at www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ESP.htm.

[99] Reisman and Westerman do acknowledge that Spain has not tried to unite the whole archipelago but has encircled only parts of it by the use of straight baselines; however, they criticise the system applied by Spain around the Canary Islands as inconsistent with article 7 of the LOSC; M.Reisman & G.S.Westerman (1991), p. 156.

[100] Saenz de Santa Maria states that Spain has applied straight baselines creating a 'semi-archipelago' in the eastern side of the Canary Islands; M.A.Saenz de Santa Maria (1994), p. 209.

Article 1 of Act No. 15 of 20 February 1978 provides that 'in the case of archipelagos, the outer limit of the economic zone shall be measured from straight baselines joining the outermost points of the islands and islets forming the archipelagos, so that the resulting perimeter conforms to the general configuration of each archipelago'.[101] These baselines have not yet been established by Decree.[102] The EEZ of the islands is currently measured from the baselines established by virtue of the Royal Decree of 1977, as presented above. Spain, however, still contemplates the possibility of establishing straight baselines around the whole archipelago of the Canary Islands.[103]

5. Balearic Islands – Spain

The Balearic Islands are an archipelago in the western Mediterranean Sea near the coast of Spain. The main islands are Majorca, Cabrera, Minorca, Ibiza and Formentera.[104] These islands form the Autonomous Community of the Balearic Islands, one of the Spanish provinces.

By virtue of Royal Decree No. 2510 of 5 August 1977,[105] Spain established a system of straight baselines for the delimitation of the territorial sea around the coast of the mainland as well as around the Balearic Islands in the Mediterranean Sea. With regard to the Balearic Islands, Spain has not united all of the islands composing the archipelago to a uniform straight baselines system; on the contrary, she has used three sets of straight baselines, two of which join together groups of islands.[106] In the group of Majorca and Cabrera there are 4 segments of straight baselines, two of which join points on the island of Majorca whereas the remaining two join Majorca with the smaller island of Cabrera and measure 39 n.m. and 18.9 n.m..[107] With regard to Ibiza and Formentera

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[101] The provisions of this Act can be found at www.un.org/Depts/los/LEGISLATIONANDTREATIES /STATEFILES/ESP.htm; With regard to the delimitation of maritime zones between states with opposite or adjacent coasts to the Spanish coast, article 2 (2) of the same Act provides that 'in the case of archipelagos, the median or equidistant line shall be determined on the basis of the archipelagic perimeter drawn in accordance with article 1 paragraph 1'.

[102] Saenz de Santa Maria argues that Spain has not proceeded with the establishment of straight baselines surrounding the whole archipelago because her action would be beyond the limits of the LOSC and because of fear of raising protests from neighbouring states; M.A.Saenz de Santa Maria (1994), p. 210.

[103] These developments are examined in Chapter 5, p. 304 *et seq.*.

[104] Majorca and Minorca are the Balearic Islands proper, while the other islands are included in the appellation as part of the province. Geographically, the islands of Majorca, Minorca and Cabrera form the Illes Gimnesias while Ibiza and Formentera form the Illes Pitiüses.

[105] The Royal Decree can be found www.un.org/Depts/los/LEGISLATIONANDTREATIES /STATEFILES/SP.htm.

[106] There is a third set of straight baselines which join basepoints on the coasts of the island of Minorca and is not thus relevant for the discussion of the present thesis.

[107] These baseline segments join respectively: Punta Anciola to Cabo Llebeitx (Dragonera) and Punta Galera to Islote Imperial.

there are 6 segments of straight baselines joining the fore-mentioned islands with three smaller islands, which are located in proximity to Ibiza, the Tagomago Islands and the islets of Vedra and Bleda Plana; the longest baseline segments in this group measure 22.4, 16 and 11 n.m..[108] Article 7 is inapplicable in both groups of islands as the conditions of this article, regarding the existence of a fringe of islands in the immediate vicinity of the coast, cannot be satisfied.[109] What is more, as noted in Chapter 2, article 10 on bay closing lines is inapplicable; even if we consider that two bays are formed in eastern and western parts of the group, the semi-circle test is not satisfied and the straight baselines drawn by Spain cannot be justified as bay closing lines.[110]

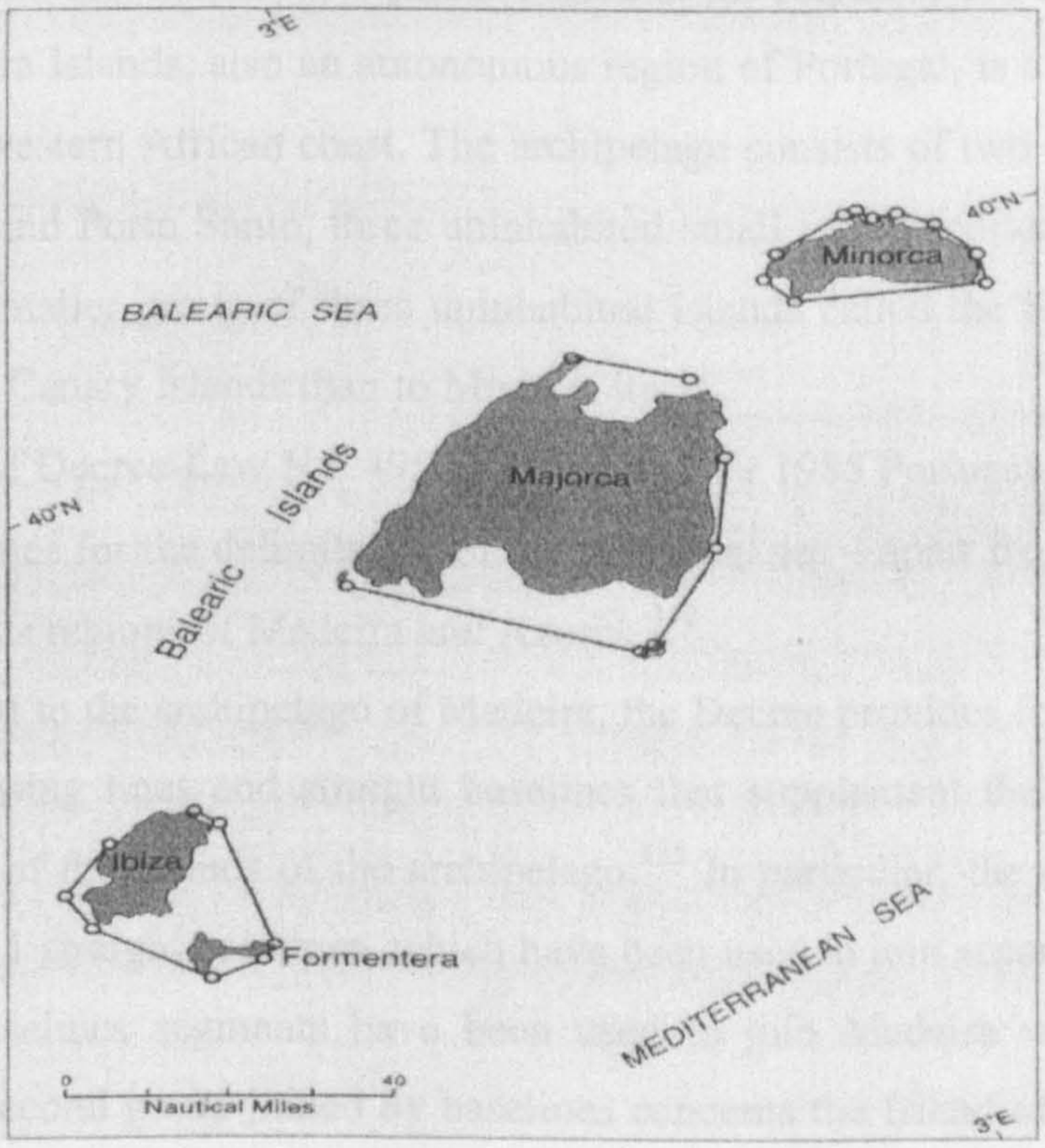

Figure 18

Source: W.M.Reisman & G.S.Westerman, *Straight Baselines in International Maritime Boundary Delimitation.*

Such as in the case of the Canary Islands, Spain has not joined together the whole archipelago of the Balearic Islands but subgroups composed of islands located at close distances to each other. The enclosure of the whole group would require the drawing of

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[108] These baselines join respectively the following basepoints: Isla Tagomago to Faro de Formentera, Cabo Berberia to Islote Vedra and Islote Bleda Plana o Cabo Eubarca.

[109] W.M.Reisman & G.S.Westerman, (1991), p. 157-8. See also J.R.V.Prescott, *The Maritime Political Boundaries of the World* (1985), p. 297.

[110] See Chapter 2 regarding the application of article 10 in the case of bays formed by islands, p. 105 *et seq.*.

long straight baselines and the enclosure of a large maritime area.[111] On the contrary, Spain has internalised waters which are closely linked to the islands.

6. Azores and Madeira Islands - Portugal

The Azores is an archipelago in the middle of the Atlantic Ocean 1,500 km from Lisbon and about 3,900 km from the east coast of North America. It is comprised of nine islands divided in three groups: the Eastern Group comprised of the islands of Sao Miguel, Santa Maria and Formigas Islets, the Central Group comprised of Terceira, Graciosa, Sai Jorge, Pico and Faial and the Western Group comprised of the islands of Flores and Corvo. Azores is an autonomous region of the Republic of Portugal.

The Madeira Islands, also an autonomous region of Portugal, is a group of islands situated off the western African coast. The archipelago consists of two inhabited islands named Madeira and Porto Santo, three uninhabited small islands collectively called the Desertas and a smaller group of three uninhabited islands called the Selvagens located closer to Spain's Canary Islands than to Madeira itself.

By virtue of Decree-Law No. 495 of 29 November 1985 Portugal applied a system of straight baselines for the delimitation of the territorial sea – apart from the mainland - of the autonomous regions of Madeira and Azores. [112]

With regard to the archipelago of Madeira, the Decree provides for the adoption of a system of 'closing lines and straight baselines that supplement the normal baseline along the coast' of the islands of the archipelago.[113] In particular, the decree prescribes the adoption of 11 straight baselines, which have been used to join separately two groups of islands. 6 baselines segments have been used to join Madeira with the Desertas Islands.[114] The second group joined by baselines concerns the Island of Porto Santo and the smaller islands located around it.[115]

With regard to the archipelago of Azores, the decree provides for the application of straight baselines in three different parts of the archipelago, that is the western, the central and the eastern group. In particular, for the eastern group, the decree provides for the application of 4 straight baselines joining the Islands of Santa Maria, Sao Miguel and

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[111] For the application of a straight baseline around the whole archipelago the longest straight baselines would be 73.56 n.m. (joining Cabrera (Islote Imperia) with Minorca (Isla del Aire)) and 68.46 n.m. joining Cabrera (Punta Anciola) and Formentera (Faro de Formentera).

[112] The Decree may be found at www.un.org/Depts/los/ LEGISLATIONANDTREATIES /STATEFILES/PRT.htm.

[113] *Ibid.*

[114] The two baseline segments joining these islands measure 36 and 10 n.m..

[115] The baselines used in this group are much smaller, the longest measuring 6.3 n.m.

the Ilheus Formigas. The baselines joining these islands together measure 62 n.m., 26.9 n.m. and 41 n.m.. With regard to the central group, the decree provides for the application of 12 straight baselines in three different groups of islands. The first set of baselines consisting of three segments joins the island of Graciosa with two rocks (Baixa dos Buzios and Ilheu da Praia) located in close proximity to its coasts with baselines measuring in total 7.83 n.m.. The second group of baselines joins the islands of Terceira with a smaller adjacent rock (Fradinhos Rock) with baselines measuring 8.2 and 2.8 n.m. The third baseline group joins together the islands of Pico, Faial and Sao Jorge and the longest baseline segments used in this group measure 19.8 n.m., 15.75 and 16.56 n.m..[116] Lastly, the Decree provides for the application of 2 straight baselines joining the Flores Island and the Corvo Island in the Western Group of the Azores, with the longest baseline measuring 13.8 n.m..

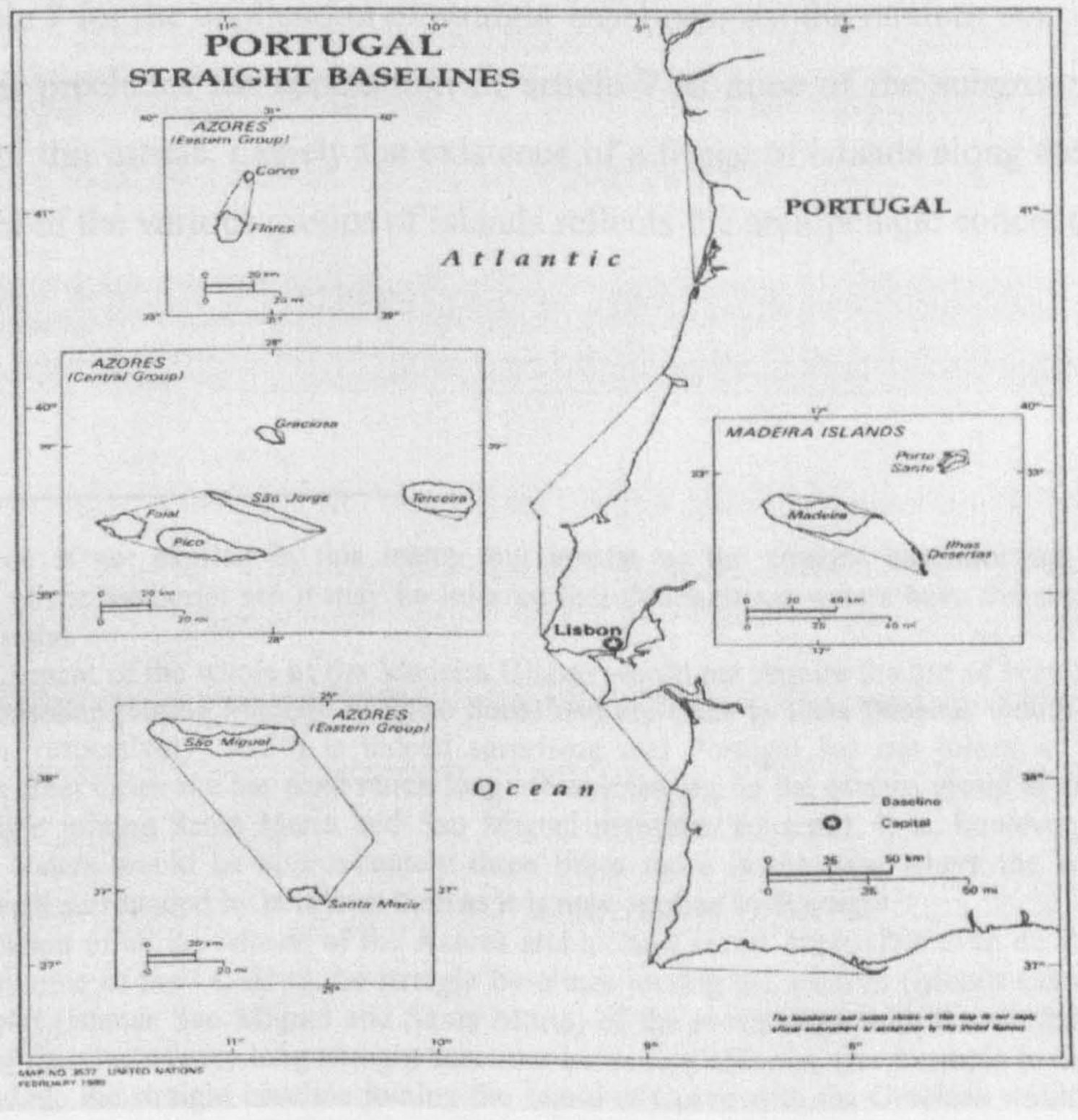

Figure 19

Source: United Nations. Office for Ocean Affairs and the Law of the Sea.: The law of the sea :baselines : national legislation with illustrative maps (New York : United Nations, 1989)

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[116] These baselines join respectively the following points: Ponta dos Cedros to Ponta dos Rosais (Ilheu) (Sao Jorge Island); from Ponta do Morro (N.) (Sao Jorge Island) to the tip of Pico Island; from Ponta de Sao Mateus (Pico Island) to Ponta de Castelo Branco (Faial Island).

Portugal declares in the Decree that the baselines drawn in the archipelago of Madeira and the archipelago of the Azores are archipelagic baselines. However, according to the 1985 Decree the waters landward of the straight baselines have the status of internal waters[117] and no provision is included providing for the right of innocent passage or any other rights for third states' vessels.

As in the previous two cases discussed above, Portugal has not united in a common straight baseline system the whole of the Madeira[118] or Azores archipelago.[119] On the contrary, she has applied straight baselines joining together groups the islands of which lie in close proximity to each other. The unification of smaller subgroups is achieved with the minor possible encroachment upon the high seas. Only islands lying at close distance to each other have been joined together and only waters lying linked closely to the islands have been internalised. Indeed, these conditions are stipulated as part of article 7 for the application of straight baselines, but the random configuration of these groups precludes the application of article 7 as none of the subgroups meet the conditions of this article, namely the existence of a fringe of islands along the coast. The encirclement of the various groups of islands reflects the archipelagic concept.

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[117] The Decree is not explicit in this matter but insofar as the straight baselines are used for the measurement of the territorial sea it may be inferred that the enclosed waters have the status of internal waters of the state.

[118] The encirclement of the whole of the Madeira Islands would not require the use of very long baselines (the straight baseline joining Madeira to Porto Santo and the latter to Ilhas Desertas would measure 40.2 and 44.2 n.m. respectively) and it is indeed surprising that Portugal has not joined all these islands together as in other cases she has used much longer baselines (eg. in the eastern group of the Azores, the straight baseline joining Santa Maria and Sao Miguel measures 62 n.m.). It is, however, true that the enclosure of waters would be approximately three times more in the case where the whole Madeira archipelago were surrounded by baselines than as it is now applied by Portugal.

[119] The unification of all the islands of the Azores archipelago seems impossible even on the basis of the archipelagic regime of the LOSC as the straight baselines joining the western (islands Corvo and Flores) and eastern part (islands Sao Miguel and Santa Maria) of the archipelago with the central group would necessitate the drawing of very long straight baselines exceeding 100 n.m. (for example in the western part of the archipelago the straight baseline joining the island of Corvo with the Graciosa would measure 146 n.m. while the baseline joining Flores with the island of Faial would measure 119 n.m.; in the eastern side of the archipelago the baseline joining Santa Maria with Pico would measure 163 n.m. and the island of Sao Miguel with Terceira 106 n.m.); Portugal could have, however, joined all the islands of the central group (Faial, Pico, Sao Jorge, Graciosa and Terceira – at the moment it has applied straight baselines joining only the first three) which would not necessitate the drawing of long straight baselines: the longest segment would be the one joining the island of Pico with Terceira which would measure 44.9 n.m.; the other baselines used would be Terceira – Graciosa 37.8 n.m., Gracosa - Faial 39.2 n.m. and lastly the one already in use by Portugal joining the island of Faial with Pico and measuring 16.5 n.m.. In the eastern group of the archipelago, Portugal has drawn longer baselines than those hypothetically suggested above, with the longest joining Santa Maria and Sao Miguel and measuring 62 n.m..

7. The Turks and Caicos Islands – United Kingdom

The Turks and Caicos Islands are an archipelago of around 40 tropical islands, 8 of which are inhabited, in the Caribbean Sea, southeast of the Bahamas. The archipelago composes an overseas territory of the United Kingdom.

By virtue of the Turks and Caicos Islands (Territorial Sea) Order 1989,[120] the United Kingdom established a system of measuring the territorial sea around the archipelago by using a combination of the low-water line and a series of straight baselines drawn between specified basepoints lying on the seaward side of the group of islands.

According to this system the baselines used for the delimitation of the territorial sea in the northern part of the archipelago is the low-water mark along the northern coast of the islands of Providenciales, North Caicos, Middle Caicos and East Caicos. With regard to the southwest, south and southeast sectors of the archipelago, the order prescribes a system of straight baselines joining basepoints on the coasts of the islands (from west to east) Providenciales, West Caicos, French Cay, White Cay, Pear Cay, Toney Rock, Long Cay, Grand Turk and East Caicos enclosing in these baselines the Caicos Bank and the Grand Turk Passage. The total length of the baselines used is 137 n.m. and the longest baseline segments measure 29.8 n.m. (basepoints 4-5) and 26.6 n.m. (basepoints 6-7). The Caicos Bank has relatively shallow waters full of reefs, which make the navigation of big vessels difficult; however the Grand Turk Passage is deep and thus navigable by big vessels.

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[120] United Kingdom, Statutory Instruments 1989, No. 1996.

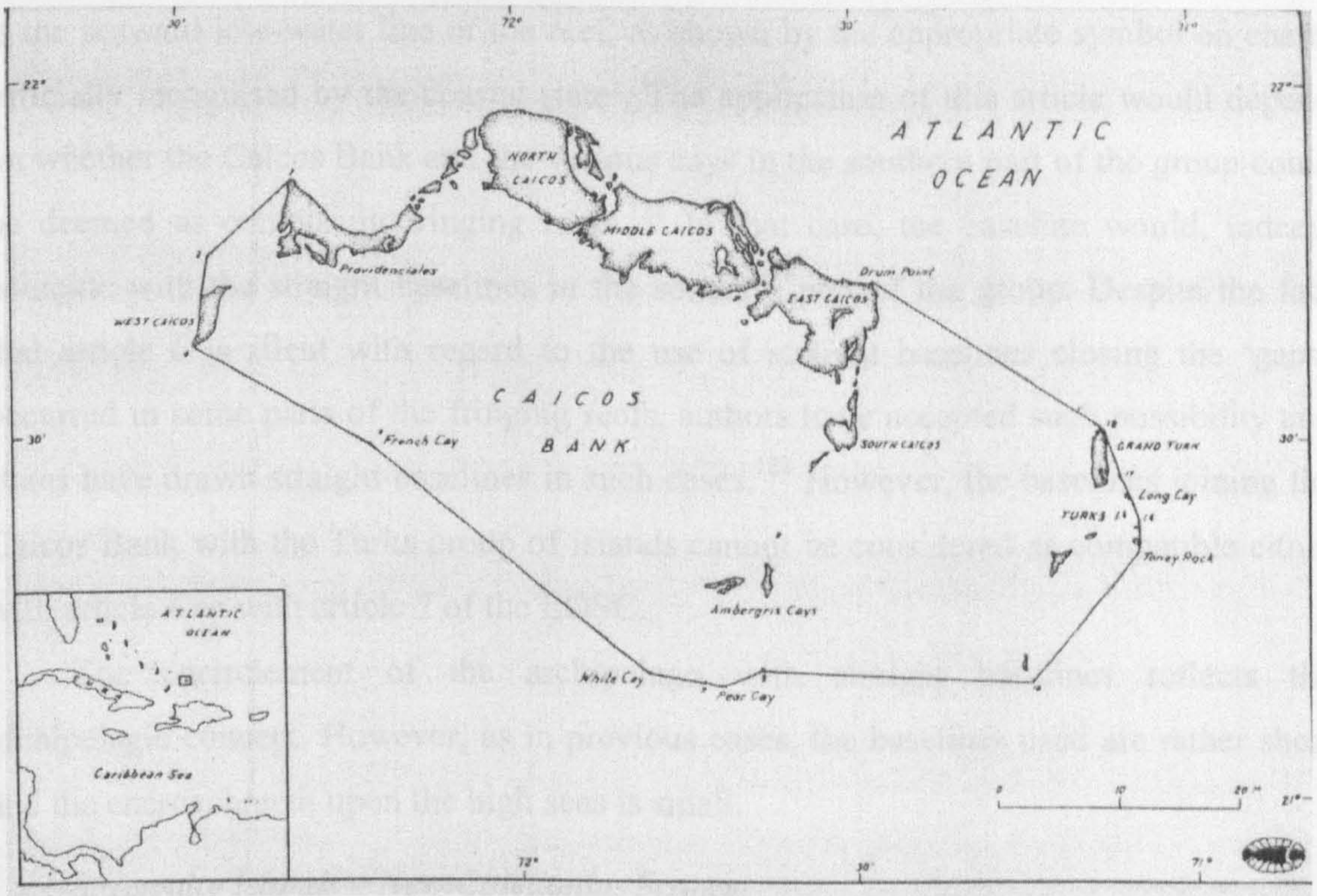

Figure 20

Source: Lines in the Sea, edited by G.Francalanci & Tullio Scovazzi

The status of the enclosed waters is not explicitly prescribed in any of the above-mentioned Orders regarding the delimitation of the territorial sea. However, it could be assumed that since the baselines are used as the inner limit of the territorial sea, the waters enclosed by these lines should constitute internal waters of the country according to article 8 (1) of the LOSC. There is no provision with regard to the right of innocent passage within the waters enclosed by straight baselines. However, in practice the right of innocent passage is accepted for foreign vessels traversing the passage between the Grand Turk and the Caicos Bank, known as Grand Turk Passage.[121]

The random configuration of the islands of this small archipelago precludes the application of article 7 of the LOSC. However, another provision of the LOSC may be deemed applicable in this case and particularly article 6 with regard to the existence of fringing reefs. This article prescribes that 'in the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea

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[121] Information from personal communication with Chris Carleton, Head of the Hydrographic Office, UK. The UK policy regarding Article 8 (2) is that where there was a recognised route for international shipping prior to the enclosure, the right of innocent passage is preserved. In the UK this also applies to the passage called The Minch between the Outer and Inner Hebrides in West Scotland.

is the seaward low-water line of the reef, as shown by the appropriate symbol on charts officially recognised by the coastal state'. The application of this article would depend on whether the Caicos Bank and the various cays in the southern part of the group could be deemed as composing fringing reefs.[122] In that case, the baseline would, indeed, coincide with the straight baselines in the southern part of the group. Despite the fact that article 6 is silent with regard to the use of straight baselines closing the 'gaps' occurred in some parts of the fringing reefs, authors have accepted such possibility and states have drawn straight baselines in such cases.[123] However, the baselines joining the Caicos Bank with the Turks group of islands cannot be considered as compatible either with article 6 or with article 7 of the LOSC.

The encirclement of the archipelago with straight baselines reflects the archipelagic concept. However, as in previous cases, the baselines used are rather short and the encroachment upon the high seas is small.

8. Loyalty Islands – New Caledonia, France

The Loyalty Islands belong to the archipelagic formation of New Caledonia and is a group of islands located in the eastern side of the main island. This small group of islands is composed of the islands of Mare, Tiga, Lifou, the atoll Ouvea and other smaller islets and reefs.

By virtue of Decree No. 2002-827 of 3 May 2002 France defined the straight baselines used for the measurement of the territorial sea in New Caledonia.[124] In the Loyalty Islands France has applied a straight baseline system composed of 14 straight baselines segments encircling the archipelago in a common baseline system. The longest baselines measure 35.96 n.m. (joining basepoints 120-121) and 35.84 n.m. (joining basepoints 112-113). The enclosed waters are considered as internal waters of the state.

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[122] For an analysis of this article regarding fringing reefs see P.B.Beazley, 'Reefs and the 1982 Convention on the Law of the Sea', 6 *IJECL* (1991), p. 296 *et seq*. See also I.Kawaley, 'Delimitation of Islands fringed with Reefs: article 6 of the 1982 Law of the Sea Convention', 41 *ICLQ* (1992), p. 152 *et seq*.
[123] R.R.Churchill & A.V.Lowe (1999), p. 52; P.B.Beazley (1991), p. 298, 300 et seq.; UN Office for Ocean Affairs and the Law of the Sea Study on Baselines (1989), p. 10-11; H.W.Jayawardene (1990), p. 98; see the systems applied by France in New Caledonia, *infra* p. 157.
[124] The Decree may be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/FRA.htm.

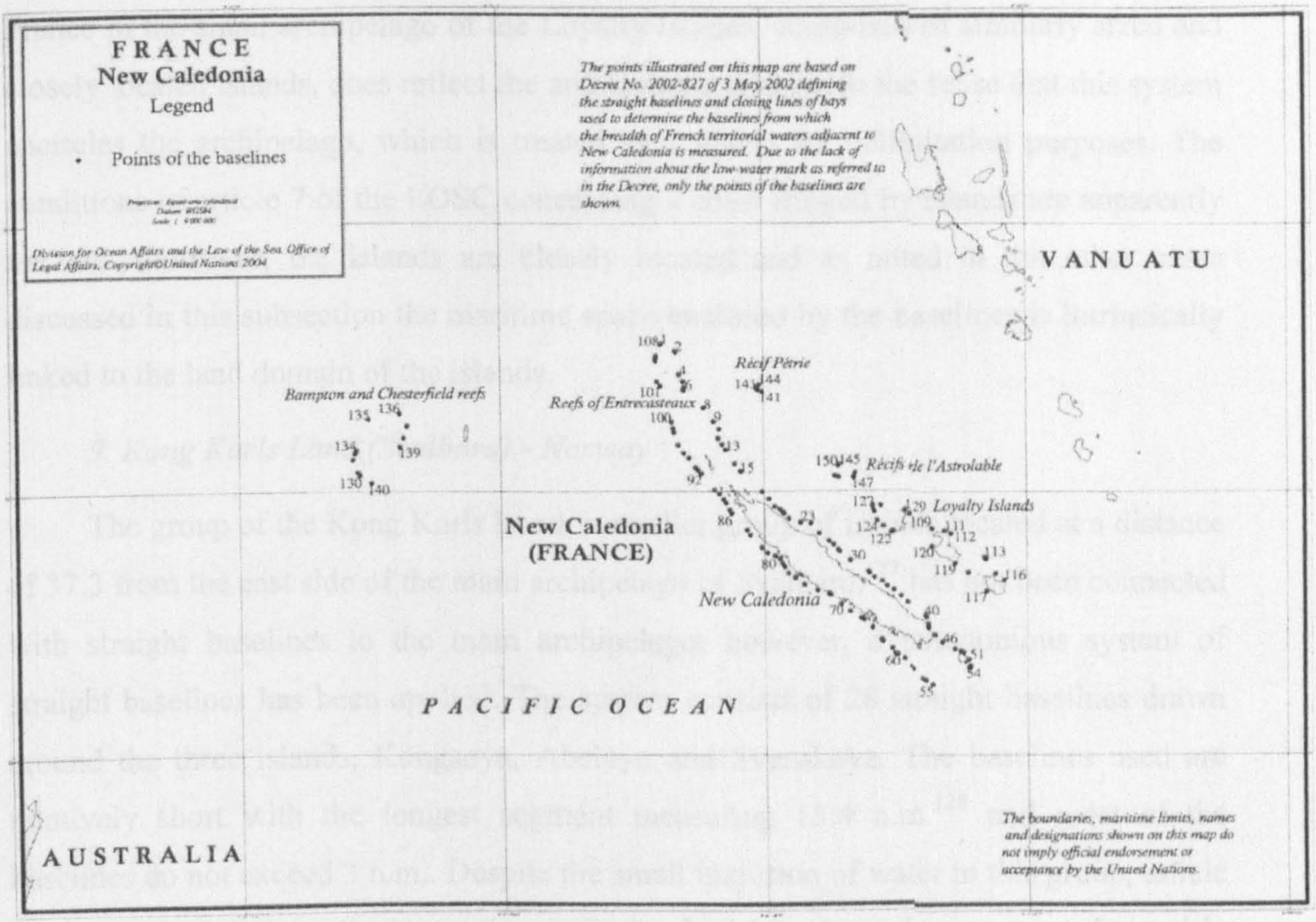

Figure 21

Source: Law of the Sea Bulletin, No. 53 (Division for Ocean Affairs and the Law of the Sea, N.York, 2004).[125]

France has applied various separate baseline systems in the archipelago of New Caledonia either in the Loyalty Islands, as above described, or in the various reefs of the archipelago.[126] She has not though applied a common straight baselines system around the whole archipelago, as this would only be possible if the archipelagic regime of the LOSC were applicable to the case of dependent archipelagos. The system applied by

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[125] The baselines in the Loyalty Islands are defined by straight baselines (loxodromes) joining points 109-129.

[126] By virtue of the same decree straight baseline systems have been used joining three groups of reefs specifically Bampton and Chesterfield reefs, Petrie reef and Astrolabe reef. Moreover, a similar system has been drawn around the main island of New Caledonia joining basepoints on the reefs fringing this island. For the use of straight baselines in the case of reefs see *supra* p. 157, note 121; however, it should be noted that France has joined the Reefs of Entrecasteaux (Atoll de la Surprise and Atoll de Huon) and the main island of Grand Terre in a common straight baseline system despite the fact that there is a navigable passage between the atolls and the fringing reefs of Grande Terre. Neither article 6 nor article 7 could be said to be applicable in this case. In the other fore-mentioned reef groups, the straight baseline appear to join together a single reef system; note however, that in the case of the Bampton and Chesterfield reefs (they compose a single reef system extending around a large C-shape with Bampton in the north and Chesterfield in the southwest) the gap between the reefs which is closed by a straight baseline in the south-east measures 40.7 nautical miles.

France in the small archipelago of the Loyalty Islands, composed of similarly sized and closely located islands, does reflect the archipelagic concept in the sense that this system encircles the archipelago, which is treated as a whole for delimitation purposes. The conditions of article 7 of the LOSC concerning a coast fringed by islands are apparently not met; however, the islands are closely located and as noted in the other cases discussed in this subsection the maritime space enclosed by the baselines is intrinsically linked to the land domain of the islands.

9. Kong Karls Land (Svalbard) - Norway

The group of the Kong Karls Land, a smaller group of islands located at a distance of 37.3 from the east side of the main archipelago of Svalbard,[127] has not been connected with straight baselines to the main archipelago; however, a autonomous system of straight baselines has been applied. The system consists of 28 straight baselines drawn around the three islands, Kongsøya, Abeløya and Svenskøya. The baselines used are relatively short with the longest segment measuring 15.4 n.m.[128] and most of the baselines do not exceed 3 n.m.. Despite the small inclusion of water in this group, article 7 of the LOSC is inapplicable as the similarly sized islands of the group are located in such a random way so as to preclude the fulfilment of the conditions of this article. The encirclement of the archipelago reflects the archipelagic concept.

10. Christiansø Islands – Denmark

Apart from the straight baselines applied in Sjaelland and Laesø, which have been analysed above,[129] Denmark by virtue of the 2003 Executive Order applied a straight baseline system to a small group of islets and rocks located west of Sjaelland.[130] The group is very small and the longest segment of straight baselines does not exceed 0.7 n.m.;[131] the maritime space enclosed by straight baselines and considered as internal waters is only marginal. However, the conditions of article 7 are not met in this small group of islands.

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[127] The distance has been measured between the far western point of the island of Svenskoya in the Kong Karls Land and the closest point in the coast of the island of Nordanstlandet.
[128] Straight baselines join the points SV060-SV061.
[129] See *supra* p. 129-131.
[130] Executive Order No. 680 of 18 July 2003 amending the Executive Order No. 242 of 21 April 1999; see *supra* note 40.
[131] Straight baseline joining points 85-6; the shorter baseline measures 0.03 n.m. (basepoints 88-89).

11. Dahlak Archipelago - Eritrea

The Dahlak is an archipelago of around 200 islands located in the Red Sea off the coast of Eritrea. Only four of the islands are inhabited with a population of around 2.500 people and the largest islands of the group are Dahlak Kebir and Nacura.

The seaward limit of the territorial waters of the Dahlak archipelago, as defined in the Federal Revenue Proclamation No. 126 of 1952, "is constituted by the quadrilateral consisting of lines joining the outermost north-eastern and south-eastern islands with the innermost north-western and south-western islands".[132]

Eritrea has not provided any details regarding the baselines around the Dahlak archipelago, nor has it drawn these baselines on a chart. With regard to the guidelines provided for in proclamation No. 126 of 1952 the baseline system should consist of straight baselines joining the outermost islands of the archipelago in such a way so as to form the shape of a quadrilateral.

The system proclaimed by Eritrea treats the archipelago as an outlying one with baselines joining the outermost points of it without connecting it to the mainland. In the *Eritrea-Yemen case* the Tribunal remarked with regard to the system as established by Eritrea that it comprised a 'somewhat unusual straight baseline system'.[133] Nevertheless, the Tribunal did not proceed to assess the validity of this system or judge its compatibility with international rules. On the contrary, it declared that 'the validity or definition' of Eritrea's straight baselines 'is hardly a matter that the Tribunal is called upon to decide'.[134] However, it described the Dahlak archipelago as a 'tightly knit group' or 'carpet of islands and islets' that formed 'an integral part of the general coastal configuration' with the baseline 'found somewhere at the external fringe of the island

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[132] In the General Secretary's 1996 report, it was mentioned that Eritrea had not enacted legislation relating to its maritime zones (GA Off.Rec., Fifty-first Session, Doc A/51/645, p. 11, para. 26; It was subsequently verified by Eritrea that 'on declaring its independence, the State of Eritrea incorporated into its maritime law the limits that had been in effect in Ethiopia'; see http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/africa.htm. Eritrea acquired its independence from Ethiopia in 1993. The legislation regulating issues concerning the law of the sea are Proclamation No. 7 – Transitional Maritime Code of Eritrea of 15 September 1991 (The Proclamation may be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/ STATEFILES/ERI.htm) proclaims that the 1960 Maritime Code of Ethiopia shall, as of 15 September 1991, serve as the Transitional Maritime Code of Eritrea. Articles 2 to 5, 6 (f) and (g), and 28 to 31 from former Ethiopian Proclamation No. 137 of 1953, as amended in 1956, relating to the measurement of the territorial sea, were declared as applicable.

[133] *Eritrea-Yemen Arbitration Award, Phase II – Maritime Delimitation*, para. 142.

[134] *Ibid.* The Tribunal avoided also the question of the validity of the straight baselines used by Eritrea by pointing out the fact that Yemen had already accepted that the Dahlak archipelago formed 'an appropriate situation for the establishment of a straight baseline system', para. 140.

system'.[135] It further declared that the Dahlak archipelago due to its geographical attributes was suitable for the application of a straight baseline system as defined in article 7 of the LOSC. Therefore, despite the treatment of the archipelago as outlying by Eritrea, the Tribunal considered it as coastal, which could 'fit' within the provisions of article 7 regarding the application of a straight baseline system joining the outermost points of the archipelago and the mainland.

What appears strange is that the internalisation of the waters of the Dahlak archipelago is compatible with the LOSC only if the Dahlak is considered as forming part of the closely located coast, whereas in the case where such an archipelago is regarded as outlying (as actually considered by Eritrea), no such system could be applied. This illustrates vividly the problem created by the special treatment of coastal archipelagos in international law and the lack of any special system for similar features which lie far from the coast. As has been analysed in the previous cases, this apparent gap has been filled by state practice.

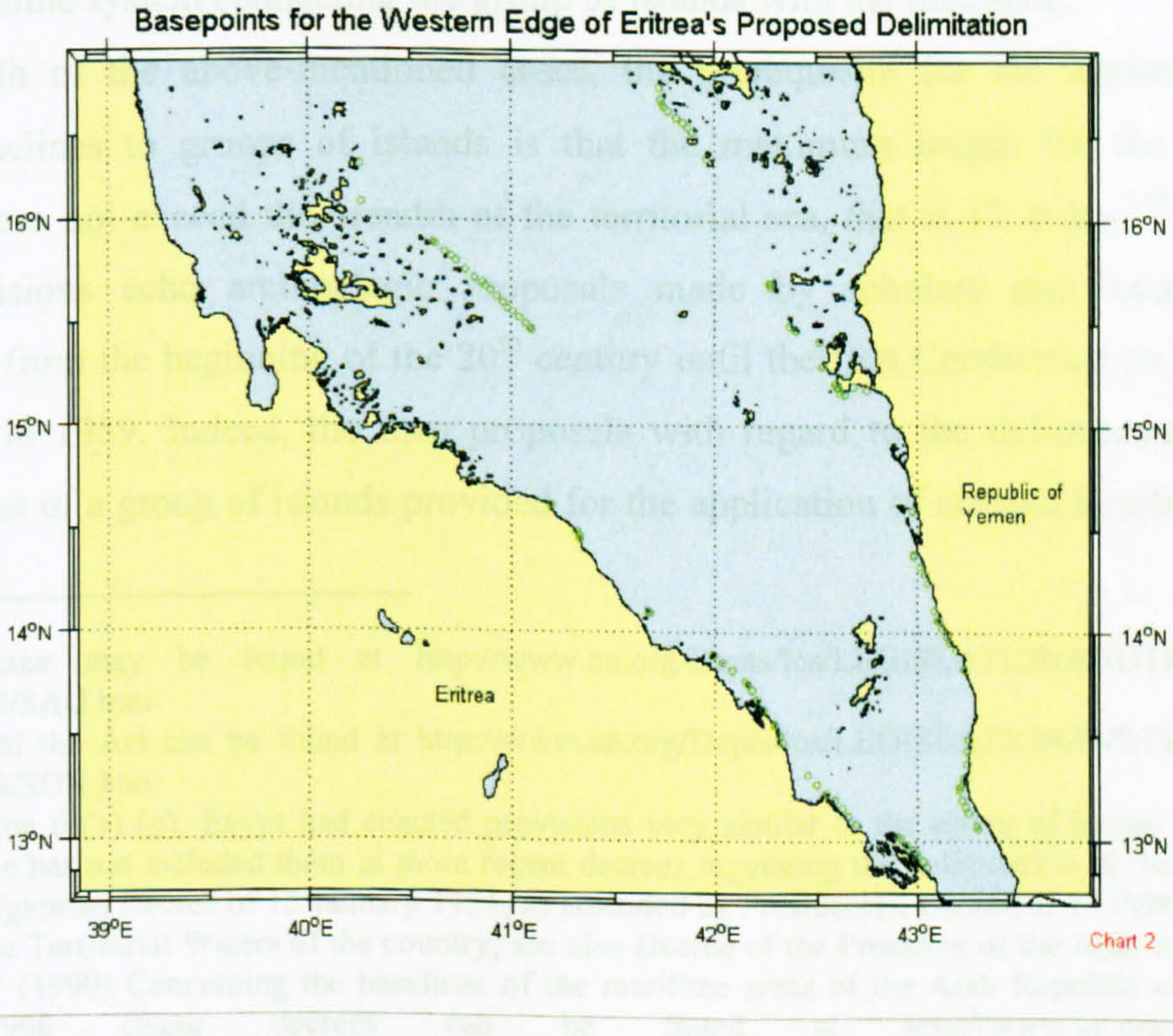

Figure 22

Source: http://www.pca-cpa.org/upload/files/chart1.gif

[135] *Ibid*, para. 139.

12. Sudan and Saudi Arabia

Sudan's and Saudi Arabia's legislation regarding the delimitation of the territorial sea include a similarly drafted provision referring to the application of straight baselines to groups of islands. In particular, Article 5 para. (g) of the No. 33 Royal Decree of 16 February 1958 of Saudi Arabia[136] and Section 6 (1) (f) of the Sudanese 1970 Territorial Waters and Continental Shelf Act[137] provide that 'where there is an island group which may be connected by lines not more than twelve nautical miles long, ... (the baseline for the measuring the breadth of the territorial waters shall consist of) lines drawn along the outer shores of all the islands of the group of islands which form a chain, or along the outer shores of the outermost islands of the group of the islands which do not form a chain'.[138] The condition for the application of this provision is that the island group is located at a distance more than the breadth of the territorial sea (that is, 12 n.m.) from the coast of the mainland. In the opposite case, that is, when the group of islands is located at a distance less than 12 n.m., both decrees provide for the application of a straight baseline system connecting the group of islands with the mainland.[139]

In both of the above-mentioned cases, the prerequisite for the application of straight baselines to groups of islands is that the maximum length for the straight baselines does not exceed the breadth of the territorial sea, that is 12 miles.[140] Both of these provisions echo archipelagic proposals made by scholars and international institutions from the beginning of the 20th century until the first Conference on the Law of the Sea in 1959. Indeed, the then proposals with regard to the delimitation of the territorial sea of a group of islands provided for the application of straight baselines only

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[136] The decree may be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/SAU.htm

[137] The text of the Act can be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/SDN.htm

[138] *Ibid*, Section 6 (1) (g). Egypt had enacted provisions very similar to the above of Sudan and Saudi Arabia but she has not included them in more recent decrees regulating the delimitation of the territorial sea. See the Egyptian Decree of 15 January 1951, as amended by Presidential Decree of 17 February 1958 concerning the Territorial Waters of the country; see also Decree of the President of the Arab Republic of Egypt No. 27 (1990) Concerning the baselines of the maritime areas of the Arab Republic of Egypt, 9 January 1990 (these decrees can be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/EGY.htm).

[139] Particularly, both Decrees provide that 'where there is an island group which may be connected by lines not more than twelve nautical miles long, of which the island nearest to the mainland is not more than twelve nautical miles from the mainland (the baseline for the measuring the breadth of the territorial waters shall consist of) appropriate lines drawn from the mainland and along the outer shores of all the islands of the group if the islands form a chain or along the outer shores of the outermost islands of the group if the islands do not form a chain'; see article 5 (f) of the Saudi Arabian Royal Decree and Para. 6 f) Chapter II of the Sudanese Decree; *supra* notes 136, 137.

[140] Article 4 of the Saudi Arabian Decree; Chapter II, para. 5 of the Sudanese Decree.

in cases where the distance between the neighbouring islands was not more than twice the breadth of the territorial sea with distances varying from 6 to 12 nautical miles.[141]

Another provision of the Sudanese Act and the Saudi Arabian Decree seems also to embody a proposal made by the Harvard Research in International Law regarding the delimitation of the territorial sea of a group of islands. This draft article provided that if the delimitation of marginal seas resulted in leaving a small area of high sea totally surrounded by marginal seas of a single state, such area would be assimilated to the marginal sea of that state.[142] Similarly, the Sudanese Act provides in Section 6 (2) that 'if the delimitation of the territorial waters in accordance with the provisions of this Act results in any portion of the high seas being wholly surrounded by territorial waters and such portion does not extend more than twelve nautical miles in any direction, such portion shall form part of the territorial waters'.[143] The Saudi Arabian Decree is similarly drafted.[144]

However, neither Sudan nor Saudi Arabia have actually by now enacted any legislation specifying the exact geodetics for the drawing of the straight baselines around groups of islands nor have they published any charts encompassing such delimitation.[145]

13. United Arab Emirates

Federal Law No. 19 of 1993 in respect of the delimitation of the maritime zones of the United Arab Emirates (October 1993) embodies two provisions regarding groups of islands. Article 6 (3) provides that 'in the case of a group of islands (the territorial sea of the state) shall be measured from straight lines joining the outer points of the outermost islands forming the group'. Article 1 defines group of islands as 'a formation of two or more islands constituting with their interconnecting waters an interrelated geographical and economic entity'. The second relevant provision stipulates that the internal waters of the state ... include:' 'the waters between the islands belonging to the state, the distance between each of which does not exceed 12 n.m.'. The latter, however, seems redundant, as with the application of straight baselines in groups of islands provided for in article 6

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[141] See Chapter 1, p. 20-22.
[142] 23 *AJIL*, Special Suppl., 1929, p. 287-288. The marginal sea proposed in the Harvard Draft Convention was 3 nautical miles (article 2).
[143] Territorial Waters and Continental Shelf Act, 1970, Chapter II, Section 6 (2).
[144] Article 6 of the Royal Decree No. 33 of 16 February 1958.
[145] J.R.V.Prescott, *The Maritime Political Boundaries of the World* (1985), p. 167

(3) of the fore-mentioned Law, the waters between the islands will have the status of internal waters of the state.[146]

Like Sudan and Saudi Arabia, the United States Emirates have not enacted any legislation specifying the exact geodetics for the drawing of the straight baselines around groups of islands nor have they published any charts illustrating straight baselines.

14. Iran

Iran first raised a claim regarding the application of a special system for the measurement of the territorial sea of groups of islands in a law enacted in 1934 where it proclaimed that 'the islands comprising an archipelago shall be deemed to form a single island and the breadth of the territorial waters shall be measured from the islands remotest from the centre of the archipelago'.[147] A similar provision was included in the 1959 Act which provided that 'the waters between the islands belonging to Iran situated at a distance not exceeding 12 nautical miles from one another shall constitute the internal waters of Iran'.[148] This provision was reiterated in article 3 of the 1993 Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea which concerned groups of islands the distance between which does not exceed 24 n.m..[149] Despite the fact that Iran has not provided for a straight baseline system joining the islands of the group,[150] which would normally lead to the internalisation of the waters, it proclaimed the waters between islands as internal waters of the state.

It is indeed true that, with the exception of the United Arab Emirates discussed above, no other state has internalised the waters between the islands without the use of straight baselines. However, whereas it could be said that the result concerning the status of the waters between the islands is the same as would be if straight baselines joining the outer islands of the group had been used, it is not clear where the limit between the internal waters and the territorial sea is.

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[146] Article 2 of the 1993 Federal Law provides that 'the internal waters are the waters on the landward side of the baseline from which the breadth of the territorial sea of the State is measured'.

[147] Mentioned in *Limits in the Seas No. 114: Iran's maritime claims* (The Geographer, Office of the Geographer, Bureau of Intelligence and Research, March 1994), p. 10-11. See also UK's Reply in the *Fisheries case,* Pleadings, Vol. II, p. 542

[148] *Ibid.*

[149] The Iranian Act may be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/IRN.

[150] By virtue of Decree No. 2/250-67 (dated 22 July 1973) Iran established a straight baseline system along its coast for the measurement of the territorial sea, but not to any outlying groups of islands.

15. Paracel Islands – China

The Paracel Islands[151] are a group of some 130 small coral islands and reefs[152] in the South China Sea. The islands are divided into the northeast Amphitrite Group and the western Crescent Group and are scattered over an area approximately 120 miles by 100 miles.

Sovereignty over these islands, which have no indigenous inhabitants, is contested; the islands are claimed by China, Vietnam and Taiwan. At the moment they are occupied by China, which has set some port facilities on Woody Island and Duncan Island and garrisons on some of the islands.

By virtue of the Declaration on the Baselines of the Territorial Sea adopted and promulgated on 15 May 1996[153] China applied a straight baseline joining the outermost points of the islands and other geographical features of the archipelago.[154] In particular, the baselines of the territorial sea adjacent to the Xisha Islands are composed of 28 straight baselines joining 28 basepoints on the islands in the perimeter of the archipelago.[155] The total length of the baselines around the whole archipelago measures 277.2 miles and the longest segments around the archipelago is 78.8 miles between points 14 and 15 and 75.8 miles between points 7 and 8.

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[151] Xisha Islands is the official name used by China; Vietnam refers to them officially as the Hoang Sa archipelago.

[152] The largest islands of the Paracel, Woody Island and Pattle Island, are only 1.62 sq.km and 0.26 sq. km respectively; *Limits in the Sea, No. 117, China: Straight Baselines Claim* (US Department of State, Office of the Geographer, Bureau of Intelligence and Research, July 1996), p. 8.

[153] Declaration of the Government of the People's Republic of China on the baselines of the territorial sea, 15 May 1996; the text of the declaration may be found at http://www.un.org/Depts/los/ LEGISLATION ANDTREATIES/STATEFILES/CHN.htm.

[154] China had proclaimed the use of straight baselines in a previous declaration without specifying though whether it would be applicable to groups of islands or without indicating the exact straight baselines; Declaration of the Government of the People's Republic of China on China's Territorial Sea on 4 September 1958, The text of the Declaration may be found at *Limits in the Seas, No. 43 Straight Baselines: People's Republic of China* (US Department of State, Office of the Geographer, Bureau of Intelligence and Research, 1972), p. 1. Similarly, in 1992 China promulgated the Law on the Territorial Sea and the Contiguous Zone of 25 February 1992, where it was prescribed that 'the PRC's baseline of the territorial sea is designated with the method of straight baselines, formed by joining the various base points with straight lines'; Law on the Territorial Sea and the Contiguous Zone of 25 February 1992; the text of the law may be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/CHN.htm.

[155] The basepoints are located on the following islands: Dongdao, Landhuajiao, Zhongjiandao, Beijiao, Zhaoshudao, Beidao, Zhongdao and Nandao.

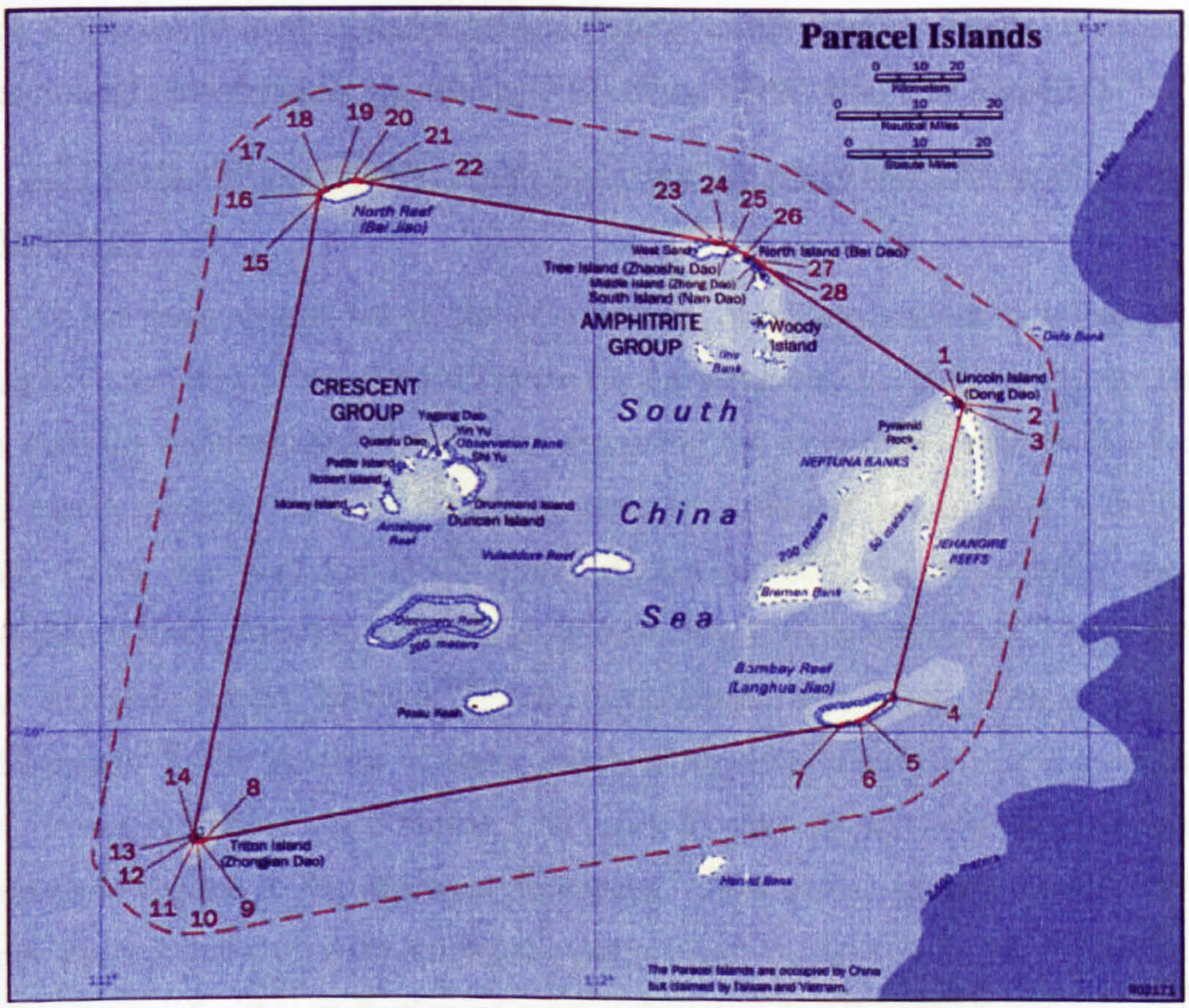

Figure 23

Source: Limits in the Seas, No. 117, China: Straight Baselines Claim, 9 July 1996 (detail)

According to the Law on the Territorial Sea and the Contiguous Zone of 25 February 1992[156] the waters 'along the baseline of the territorial sea facing the land' will be internal waters of the People's Republic of China. No provision regarding the recognition of innocent passage or any other rights in favour third states has been included.

In contrast to the practice discussed above, the distances between the geographical features of this archipelago are long and China has enclosed a vast maritime space considering it as the internal waters of the state. Article 7 is obviously inapplicable. This application resembles the practice of archipelagic states in broadly-scattered archipelagos; however, as pointed out by the US State Department, even in the case in

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[156] *Supra* note 112.

which China could apply an archipelagic regime to the Paracel Islands, the maximum water-to-land ratio stipulated in article 47 (2) of the LOSC would be exceeded.[157]

3.3 Practice of continental states applying the low-water rule in their outlying archipelagos

As has been mentioned in the Introduction, there are various continental states which have not applied any special system for the measurement of the maritime zones in their outlying archipelagos; these states are using the low-water mark on the coast of each island, treating, thus, the islands as separate units and not as parts of an integral whole. Cases like that include[158] India (Andaman and Nicobar Islands), the USA (Hawaiian Islands, Aleutian archipelago, Florida Keys, Midway Islands, Virgin Islands), New Zealand (Cook Islands),[159] the Netherlands (Antilles), Greece (Cyclades, Dodecanese).[160] The practice of some states, particularly maritime powers such as the USA, is not surprising since during UNCLOS III they opposed any expansion of the archipelagic regime to dependent archipelagos. Other states, such as Greece or India, despite the fact that they were among the states which pressed during the negotiations of the Conference for the attribution of a special regime to all archipelagos regardless of their political status, have not applied any special baseline regime to their outlying archipelagos.[161]

However, for some years India, as mentioned by Jayawardene, had restricted the navigation rights of third states' vessels in the waters of the Andaman and Nicobar Islands probably for security reasons; however, she later abrogated the relevant notice to mariners.[162] It is also mentioned by Rajan that India's intention with the 1976 Territorial Waters, Continental Shelf, Exclusive Economic Zone and other Maritime Zones Act was 'to apply the archipelagic principle to its outlying archipelagos of Andamans, Nicobar and Lakshwadweep islands'.[163] Indeed, this Act provides that the limit of the maritime

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[157] *Limits in the Seas, No. 117, China: Straight Baseline Claim*, p. 8. However, the length of the baselines used in the Paracel Islands meet the conditions prescribed by article 47 (2); in terms of the length of the straight baseline segments, the longest measure 75.79 n.m. (basepoints 7-8) and 78.8 (basepoints 14-15).

[158] The list is by no means exhaustive.

[159] The UK government expressly rejected any archipelagic claim for the Cook Islands in the Anglo-Norwegian *Fisheries case*, Reply of the UK, Pleadings Vol. II, p. 523-4.

[160] For the Aegean archipelago see *infra* 173 *et seq.*.

[161] Actually Greece has not applied any straight baseline systems in any part of her coasts.

[162] H.W.Jayawardene (1990), p. 171-2 (fnt 447).

[163] H.P.Rajan, 'The Legal Regime of Archipelagos', 29 *GYIL* (1986), p. 141; Mani stresses that by virtue of this law the archipelagic regime applied to the Andaman-Nicobar and Lakshadweep island groups; V.S.Mani (1980), p. 104.

zones 'means the limit of such waters, shelf or zone with reference to the mainland of India as well as the *individual or composite group or groups of islands* (emphasis added) constituting part of the territory of India'; however, no special system for the measurement of the maritime zones has been established for groups of islands and the low-water mark is used.

There are also some states which have applied a special system in some of their outlying archipelagos but not in others. For example, the UK – as analysed above - has applied a system of straight baselines for the Falkland Islands and Turks and Caicos while at the same time it is using the low-water mark for the delimitation of the territorial sea of the Bermudas or the Virgin Islands. France has also applied selectively a system of straight baselines for the delimitation of the territorial sea for some of its archipelagic territories such as the Kerguelen Islands, Guadeloupe and Loyalty Islands whereas French Polynesia has no special regime with regard to the delimitation of the maritime zones. Finally, Australia has applied a straight baselines system around the Furneax Group and the Houtman Abrolhos Islands but she has not applied any such system for the delimitation of the territorial sea of the Keeling (Cocos) Islands. This differential treatment in the various archipelagos should not be considered as arbitrary; it is here argued and will be discussed in detail in Chapter 4, that it is connected with the views of states regarding the limits of the rules regulating the application of straight baseline systems to groups of islands.[164]

Two cases of dependent outlying archipelagos merit particular mention. The first concerning the Hawaiian archipelago is presented with a view to demonstrating that a dependent archipelago may have different interests or may perceive its interests in a different way than the state administering it. In the particular case of Hawaii, the historic claim of the state of Hawaii over the waters between the islands of the archipelago were subordinated to the will of the federal government which rejected the internalisation of these waters.

The second case which merits attention concerns the Aegean archipelago. The Aegean archipelago has been characterised as a peculiar archipelagic feature, which cannot be classified with certainty either in the category of coastal or outlying archipelagos.[165] The claim of Greece with regard to the archipelago constitutes an

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[164] See Chapter 4, p. 251 *et seq*.

[165] L.Lucchini & M.Voelckel, (1990), p. 357: 'la repartition des archipels entre ces deux catégories bien tranchées peut toutefois poser problèmes dans certains cas tels celui des îles grecques'.

unusual unprecedented case not connected with the baseline system but with the passage rights in the waters between the islands. This practice is examined in this subsection with a view to showing firstly the implications of the absence of a special regime for dependent archipelagos particularly regarding the regime of the various straits created between the islands and secondly with a view to presenting a potential alternative (albeit unusual[166]) to the archipelagic regime.

1. Hawaii – USA

Hawaii is an archipelago of 137 islands, islets and atolls in the Pacific Ocean. The archipelago is divided in two parts: the main Hawaiian islands and the Northwestern Hawaiian Islands or Leeward Islands.[167] The Hawaiian Islands were formally annexed to the United States of America in 1898 and in 1900 they were granted self-governance. In 1959, Hawaii attainted statehood and became the 50th state of the United States.

Hawaii has a history of claims over the waters in the channels between the islands, which though ambiguous may be considered as a precedent of an archipelagic claim.[168]

In 1846 Kamehamela III the King of Hawaii promulgated an Act, which provided that 'the jurisdiction of the Hawaiian Islands shall extend and be exclusive for the distance of one marine league seaward, surrounding each of the islands of Hawaii, Maui, Kahoolawe, Lanai, Molokai, Oahu, Kauai and Niihau; commencing at low water mark on each of the respective coasts of said islands. The marine jurisdiction of the Hawaiian Islands shall also be exclusive in all the channels passing between the respective islands and dividing them; which jurisdiction shall extend from island to island.'[169] The Act also provided for the defence of these closed seas and islands and the prohibition of their use by other nations.[170] In August 1850 the Privy Council provided in a similar way that the

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[166] Van Dyke refers to the declaration as 'feisty', J.M.Van Dyke, 'An analysis of the Aegean Disputes under International Law', 36 *ODIL* (2005), p. 93.

[167] The islands of the main group are from south to north the following: Hawaii (also known as the Big Island), Maui, Kaho'olawe, Lana'i, Moloka'i, Molokini, O'ahu, Kaua'i, Ni'ihau, Lehua and Kaula. All of them are inhabited except Kaho'olawe which has only temporary residential facilities. The Northwestern Hawaiian Islands or Leeward Islands consist of the following small uninhabited islands, atolls and reefs: Kaula, Nihoa, Necker, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan, Lisianski, Pearl and Hermes Reef (temporary residential facilities) and Kure. Lastly, the Midway Islands, a group of 5 islands in the Leeward Islands is not legally a part of the State of Hawaii but an unincorporated territory of the United States.

[168] G.Francalanci & T.Scovazzi (1994), p. 8.

[169] Act of Kamehameha III; Statute Law of 1846, Vol. I, Ch. VI, art. 1, Section I; quoted in Civil Aeronautics Board v. Island Airlines Inc. 235 *F.Supp.*, p. 997.

[170] *Ibid*, Section II.

sovereignty of the Kingdom of Hawaii extended from the high-water mark 'to all navigable straits and passages among the Islands'[171].

It was declared in the Neutrality Proclamation enacted by the King of Hawaii in 1854 that the neutrality of the Hawaian Islands should be respected by all foreigners in all areas covered by Hawaiian jurisdiction including 'all the channels passing between and dividing said islands from island to island'.[172] Similarly, in the Neutrality Proclamation of May 1877, it was proclaimed that all the belligerents should avoid hostilities within the territory and jurisdiction of the Kingdom including 'not less than one marine league from the low-water mark on the respective coasts of the islands composing this Kingdom and also all its ports, harbours, bays, gulfs, skerries and arms of the sea cut off by lines drawn from one headland to another'.[173]

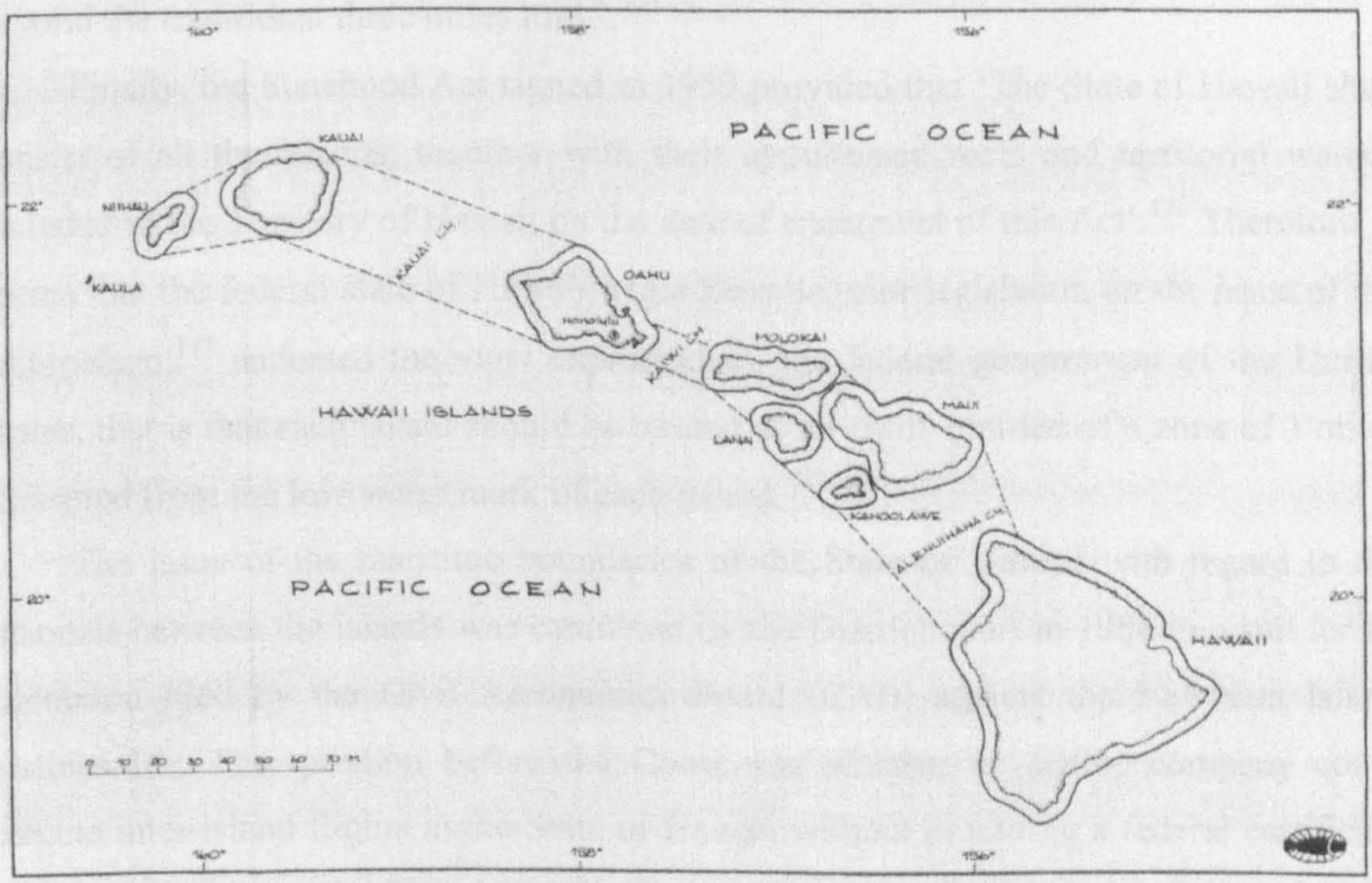

Figure 24

Source: Lines in the Seas, G.Francalance & T.Scovazzi (eds).[174]

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[171] Privy Council Record, Vol. 3, p. 425; also cited in Civil Aeronautics Board v. Island Airlines Inc., 235 *F. Supp.*, p. 998. The Hawaiian Civil Code of 1859 repealed the aforementioned instruments, T.A.Mensah (1995), p. 181.

[172] H.G.Crocker, *Extend of the Marginal Sea* (Washington: Government Printing Office, 1919), 595-596. The text of the 16 May 1854 Neutrality Proclamation is also cited in CAB v. Island Airlines, Inc., 235 F. Supp., p. 998.

[173] *Ibid*, p. 595-596. The text of the 29 May 1977 Neutrality Proclamation is also cited in CAB v. Island Airlines, Inc., 235 *F. Supp.*, p. 998.

[174] Francalanci and Scovazzi have attempted to draw hypothetical baselines based on the 1854 Neutrality Proclamation of the King of Hawaii. See figure 15, G.Francalanci & T.Scovazzi (1994), p. 8-9.

Despite the fact that during the nineteenth century, the Kingdom of Hawaii claimed sovereignty over the channels between the islands considering that the intervening waters were an integral part of the Kingdom, since its annexation to the United States, the federal government made clear that it would not accept such a claim. It therefore declared that the 3-mile territorial sea of the Hawaiian territory should be measured from the low-water mark on the coast of each island.

There was much discussion and some confusion concerning the Hawaiian claim to the inter-island channel waters during the hearings for the Constitutional Convention before the Committee on Interior and Insular Affairs of the United States Senate. However, it appears that the delegates of Hawaii including the Governor, 'stated positively and unequivocally that Hawaii made no claim for control of ocean waters beyond the traditional three miles limit'.[175]

Finally, the Statehood Act signed in 1959 provided that 'The State of Hawaii shall consist of all the islands, together with their appurtenant reefs and territorial waters, included in the Territory of Hawaii on the date of enactment of this Act'.[176] Therefore, it seems that the federal state of Hawaii, regardless its prior legislation on the issue of the archipelago,[177] endorsed the view expressed by the federal government of the United States, that is that each island should be treated as an entity entitled of a zone of 3 miles measured from the low-water mark of each island.[178]

The issue of the maritime boundaries of the State of Hawaii with regard to the channels between the islands was examined by the District court in 1964 in a suit for an injunction filed by the Civil Aeronautics Board (CAB) against the Hawaiian Island Airlines Inc. The question before the Court was whether an airline company could execute inter-island flights in the State of Hawaii without procuring a federal certificate by the Civil Aeronautics Board (CAB). The argument invoked by the CAB was that the airline was in fact engaged in inter-state transportation, as the waters in the channels

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[175] US Senate, 83rd Congress, Hearings of the Committee on Interior and Insular Affairs, part 2, pp. 46, 47, 51, 121, 132, 265.

[176] Statehood Act, para. 2, p. 73 as quoted in *Civil Aeronautics Board v. Island Airlines Inc.*, 235 *F.Supp*, p. 997.

[177] O'Connell comments that royal claims were not really legislative effective or indeed implemented, D.P.O'Connell (1971), p. 43 see particularly fnt 6.

[178] See *United States v. California,* 332 *US*, p. 19, regarding the US international policy of freedom of the sea. In a Memorandum of the Secretary of State Rusk in 1964 it was stated that 'It is therefore the Department's position that each of the islands of the Hawaiian Archipelago has its own territorial sea three miles in breadth measured from low-water mark along the coast of the island. It is our view that the waters seaward of these belts of territorial sea are high seas over which no state exercises sovereignty'; M.Whiteman (1974), p. 281.

between the islands were parts of the high seas and not part of the state of Hawaii and therefore the flight over them should be subject to the CAB's authority. After an appeal was lodged on behalf of the Island Airlines Inc. against the permanent injunction granted by the District Court, the Court of Appeal remanded the matter to the District Court with instructions to enter a new decree after determining the exact maritime boundaries of the State of Hawaii.[179]

The District Court examined whether there was a historical claim on behalf of the State of Hawaii over the waters between the islands forming the Hawaiian archipelago and concluded that despite the rather abstract claims raised by the Kingdom of Hawaii in the 19th century, the maritime territory of Hawaii after the annexation of the Kingdom by the US and the attribution of statehood in 1959 included a territorial zone of 3 miles length measured from the low-water mark on the coast of each island whereas the rest of the sea between islands was to be regarded as high seas.[180]

The Court of Appeal reaffirmed the Judgment of the District Court on the ground that the rights of the States with regard to the delimitation of their inland waters were subordinate to the will of the federal Government of the US, which explicitly had opposed any different treatment for the channels between the islands of Hawaii.[181] With regard to the subject of archipelagos the Court stated that: 'If the channels between the islands were to be held inland waters, where would the boundaries lie? In oral argument the appellant here argued that a straight baseline should be drawn completely around the western perimeter of the Hawaiian archipelago from island headland to island headland, i.e. from Niihau's Kawaihoa Point to Hawaii's Ka Law, a distance of approximately 350 statute miles, coming no closer than fifty miles to land over two-thirds of its distance. Even straight baselines running between headlands on either side of the channels between islands would produce resulting 'channels' aptly described in the District Court's opinion as 'fantastic''.[182]

This decision echoes the United States policy, which favours the freedom of the seas in the case of groups of islands. The Court was explicit in this point: '... where the Congress has failed to delineate boundaries with certainty, the Courts must define such

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[179] *Island Airlines Inc. v. Civil Aeronautics Board,* 331 *F.2d,* p. 207.
[180] *Civil Aeronautics Board v. Island Airlines Inc.*, 235 *Supp.* 990 (1964).
[181] *Island Airlines Inc. v. Civil Aeronautics Board,* 352 *F. 2d* (1965), p. 745.
[182] *Ibid,* p. 743.

limits (United States v. State of California 381 US, p. 150-60). In doing so they need not ignore international law, nor the 'position' of the State Department'.[183]

During UNCLOS III, the United States did not support the idea of the application of an archipelagic regime for dependent archipelagos, despite the fact that it could also be favoured by this protective regime with regard to Hawaii[184] and other archipelagic territories such as the Aleutian archipelago. Nowadays, the Hawaiian archipelago has no special status with regard to the delimitation of the maritime zones and therefore, the territorial sea and the other maritime zones are measured from the low-water mark on the coast of each island.[185]

2. Aegean archipelago – Greece

The Aegean archipelago, that is the area of the Aegean Sea, is composed of various island groups, some of which are more coherent, comprised of islands located at a close distance to each other, such as the groups of the Cyclades, North Sporades and the Dodecanese and other with less obvious link, such as the group of the eastern Aegean islands. Geographically, the island groups of Sporades and Cyclades are close to the mainland coast whereas the Dodecanese archipelago – despite its proximity to the Cyclades group - is closer to the Turkish coast.

Due to these geographic particularities, there are implications regarding the classification of the archipelago as coastal or outlying. Politakis refers to the Aegean archipelago as the archetype of coastal archipelagos but suggests that only the groups of Cyclades and Sporades could be joined with straight baselines to the mainland coast,[186] treating, thus, these groups – and not the whole of the archipelago - as coastal archipelagos. Bowett connects the characterisation of an archipelago as coastal with the

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[183] *Ibid*, p. 739. However, O'Connell points out that the Court found it easy to change direction in respect of the Cuban archipelago, whose claims to water surrounding the archipelago were favoured by the US government. In its judgment the District Court declared that 'the site at which the ship was loaded is inside a well-defined archipelago and that the line of keys forming their archipelago is part of Cuban territory'. See *Banco Nacional de Cuba v. Sabbatino,* 193 *F. Supp.* 375, p. 379 (1961). D.P.O'Connell (1971), p. 45.

[184] N.Barron (1980-1), p. 511.

[185] Territorial Sea of the United States of America by the President of the United States of America Proclamation of 27 December 1988; this may be found http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/ STATEFILES/USA.htm.

[186] It has been argued by Politakis that a system of straight baselines may be reasonably applied joining the groups of Northern Sporades and Cyclades with the mainland coast in the points of their proximity. Despite the fact that he does not elaborate the legal basis for such application, he does mention that state practice has offered ample examples (exaggerated at times – as he admits) and that such a system would be reasonable on the basis of the close adjacency of the groups with the mainland not only on geographical terms but also political, economic or cultural; G.P.Politakis, 'The Aegean Agenda: Greek National Interests and the New Law of the Sea Convention', 10 (4) *IJMCL* (1995), p. 521-3.

application of article 4 of the TSC (article 7 of the LOSC): 'where an island or group of islands lies offshore, but in such a geographical relationship to the mainland that a single straight baseline system would not be permissible because it would contravene the conditions of article 4 relating to the general direction of the coast or the subjection of the waters to the regime of internal waters, such islands do not qualify as true 'coastal archipelagos'.[187] In the light of the definition suggested by Bowett, the Cyclades could not qualify as a coastal archipelago as the application of straight baselines would contravene the conditions of article 7 regarding its being located 'along the coast' and of following the general direction of the coast.[188] Lucchini and Voelckel discern two categories of coastal archipelagos: in the first one they classify archipelagos which are located along the coast and are closely dependent 'upon the land domain'; in the second category they classify archipelagos which are not located along the coast but which are spread seaward forming a sort of cap.[189] On the basis of these definitions the Cyclades would certainly fit in the second category; however, in that case these authors do not specify whether article 7 of the LOSC may be applicable.

Regardless of whether the Aegean archipelago or more properly the archipelagic subgroups composing the Aegean archipelago may be classified as coastal or outlying archipelagos (the difference in principle would be whether the application of a system of straight baselines would join the group of islands as an autonomous whole or whether the straight baselines would connect the group with the mainland), Greece has not applied a system of straight baselines in any part of her coasts; she, thus, uses the low-water mark for the delimitation of the territorial sea of the islands in the Aegean.

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[187] D.W.Bowett (1979), p. 90; referring also to G.Marston (1973), p. 171-2.

[188] There are cases where coastal states have applied straight baselines around their coastal archipelagos despite the fact that the archipelagos do not lie along the coast but are spread seaward and thus the straight baselines applied do not follow the general direction of the coast but the configuration of the coastal archipelago (however it should be noted that the other conditions of article 7 of the LOSC are met). In these cases no protests have been raised by other states; see for example the case of the Aaland Islands of Finland. In this case it has been argued that the straight baselines system follows the general configuration of the archipelago (and thus not of the coast); what is crucial in the consideration of this system is the fact that the archipelago resembles ('is tautologous to' as characteristically pointed out by Reisman and Westerman) the Norwegian coast which was the 'model' for the drafting of article 7; see M.Reisman & G.Westerman (1992), p. 109-111; see also US State Department, *Limits in the Seas No. 48 Straight Baselines: Finland*, p. 4. A similar case concerning a coastal archipelago spreading at a distance from the coast of the mainland concerns the Canadian archipelago; Canada has applied a straight baselines encircling the archipelago and joining it to the mainland coast on the basis of historic reasons and not on the basis of article 7 of the LOSC; for the Canadian archipelago see D.Pharand, *Canada's Arctic Waters in International Law* (Cambridge: Cambridge University Press, 1988); M.Killas, 'The legality of Canada's claims to the waters of its Arctic Archipelago', 19 *Ottawa Law Review* (1987), p. 95-136; R.S.Reid, 'Canadian claim to sovereignty over the waters of the Arctic', 12 *Can.YIL* (1974), p. 111 *et seq.*.

[189] They refer to the following examples : the Danish archipelago, North Land Islands in the Arctic Ocean (Russia), the coasts of Russia, the Canadian archipelago; L.Lucchini & M.Voelckel (1990), p. 358.

Greece has, however, filed an interpretative declaration regulating the passage regime in straits formed by the islands of the archipelago. In particular, in the declaration filed upon signature and ratification of the LOSC Greece stated the following: 'In areas where there are numerous spread out islands that form a great number of alternative straits which serve in fact one and the same route of international navigation, it is the understanding of Greece, that the coastal state concerned has the responsibility to designate the route or routes in the said alternative straits, through which ships and aircrafts of third countries could pass under transit passage regime, in such a way as on the one hand the requirements of international navigation and overflight are satisfied and on the other hand the minimum security requirements of both the ships and aircrafts in transit as well as those of the coastal state are fulfilled'.[190]

There is a connection between the Greek declaration and the issue of archipelagos. In an island-studded maritime space, many straits are formed between the islands which may have the status of straits used for international navigation, where transit passage applies. The archipelagic regime reduces the dangers arising from such perspective by according archipelagic states the right to designate the sea-lanes in which third states' vessels and aircrafts will exercise the right of archipelagic sea-lane passage (resembling the transit passage regime).[191] Therefore, archipelagic sea-lane passage does not cover all archipelagic straits but only those designated by the archipelagic state.[192] Security threats posed by the passage of third states' vessels from the multiple straits created by the various islands of the archipelago was one of the reasons advanced in support of

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[190] The Greek Declaration may be found at www.un.org/Depts/los/convention_agreements/convention_declarations.htm. Article 41 of the LOSC provides for the designation of sea-lanes and the prescription of traffic separation schemes in straits for the promotion of safe passage of ships. It seems that Greece's declaration was intended to interpret this provision; it might be said, however, that it exceeds the ambit of the provision by declaring not the designation of sea lanes in straits used for international navigation but specifying which of the straits may be considered as straits in the meaning of Part III LOSC where the transit passage will be exercised.

[191] See Chapter 1, p. 55-57. According to article 53 (4) of the LOSC archipelagic sea-lanes 'shall include all normal passage routes used as routes for international navigation or overflight through or over archipelagic waters'.

[192] The discretion of the archipelagic state is though impaired by the fact that the designated sea lanes must 'include all normal passage routes used as routes for international navigation or overflight' (article 53 (4)); however, this does not necessarily mean that all straits within the archipelagic formation will qualify as routes normally used for international navigation. Straits not falling within archipelagic sea-lanes will be subject to a suspendable right of innocent passage according to article 52; see B.Kwiatkowska & E.R.Agoes (1991), p. 44-46. What is more, in the absence of any such routes, the archipelagic state is not obliged to designate archipelagic sea-lanes, nor are foreign vessels and aircrafts allowed to exercise such right; M.Munavvar (1995), p. 171.

archipelagic claims.[193] Indeed, as seen from the Greek declaration, the main concern of Greece was the security of the state in the straits created between islands.[194]

Turkey - despite the fact that she has not signed or ratified the LOSC - protested against the Greek declaration and stressed that Greece's intention to disallow the transit passage from certain straits created in the Aegean Sea contravenes the provisions of the LOSC on straits and the rules and principles of international law. In particular, Turkey accused Greece of attempting to 'create a separate category of straits, i.e. 'spread out islands that form a great number of alternative straits' particularly as Greece, according to the Turkish view, failed in having a special regime recognised for the Aegean archipelago such as the one attributed to archipelagic states.[195] Therefore, Turkey considered the Greek declaration as an attempt to circumvent the provisions of the LOSC both on straits and archipelagic states.[196]

Greece in her reply to the Turkish objections rejected any intention of evading the provisions of the LOSC by creating any separate category of straits used for international navigation.[197] She did not refer particularly to the Turkish allegation that the designation of sea-lanes for the exercise of the transit passage was an attempt to provide an alternative regime for archipelagos in the absence of such a regime in the LOSC. It should be, however, pointed out that Greece has not enforced its declaration and has not designated any routes in the straits for the exercise of transit passage from vessels and aircrafts of third states

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[193] This interconnection was clear during the negotiations of UNCLOS III, where maritime powers, with concerns for the preservation of unimpeded passage in archipelagic straits, pressed for the adoption of a similar regime of transit passage for straits traversing the archipelagos; see Chapter 1, p. 55-57.

[194] It has been suggested by authors that the intention of the Greek government in filing this declaration was to 'protect' straits close to the mainland, particularly the Kea Strait southeast of Athens, from the security dangers arising by the unimpeded passage of aircrafts; D.S.Salzman, 'A legal survey of the Aegean Issues of Dispute and Prospects for a Non-Judicial Multidisciplinary Solution' in B.Ozturk (ed), *The Aegean Sea 2000* (2000), p. 187, fnt 65. As noted by Van Dyke, these straits may, anyway, be subject to the exception of article 38 (1) of the LOSC called the 'Messina exception' (article 38 (1) provides that 'transit passage shall not apply if there exists seaward of the island a route through the high seas or through an EEZ of similar convenience with respect to navigational and hydrographical characteristics'. J.M.VanDyke (2005), p. 93.

[195] Indeed, Greece was one of the states which during UNCLOS III pressed – unsuccessfully though – for the inclusion of dependent archipelagos in the regime prescribed for archipelagic states; see Chapter 1, p. 40-41, 48.

[196] Objection to the declaration made by Greece upon signature and ratification of the Convention communicated by the Permanent Mission of Turkey to the UN in a note verbale dated 19 December 1995; *Law of the Sea Bulletin*, No. 30 (N.York: UN Publ., 1996), p. 9.

[197] Note dated 30 June 1997 regarding the Turkish notification dated 22 February 1996 on the interpretative statement made by Greece at the time of both signature and ratification of the UK Convention on the Law of the Sea, *Law of the Sea Bulletin*, No. 35 (N.York: UN Publ., 1997), p. 11.

Assessing the implications of such declaration for the archipelagic concept, it should be pointed out that the main attributes of the archipelagic concept are absent in this practice, namely, the subjection of the waters of the archipelago in a uniform regime and the consideration of the archipelago as a whole for the purpose of measuring the maritime zones. However, the attempt to regulate navigation in the various straits created within the archipelago echoes the security concerns raised by archipelagic states and states in possession of archipelagos during UNCLOS III. The passage of foreign warships, submarines and aircrafts from a vulnerable maritime space, namely the straits created by the various islands lying in close proximity to each other, would pose a threat to the national security of the archipelago. The Greek declaration reflects these concerns but the solution Greece is suggesting – which should be noted has not been implemented in practice- has no precedent in international law, as no other state has tried to designate sea-lanes for the exercise of transit passage within an archipelagic formation. However, no objection has been filed by any of the parties to the LOSC – though it might be said that this may be due to the reluctance of Greece to designate any routes.

Some authors have accepted the compatibility of this declaration with the provision of the LOSC on straits.[198] One commentator, in particular, has linked the declaration filed by Greece and the archipelagic nature of the Aegean: 'il est certain qu'au terme d'une argumentation par analogie, reposant à la fois sur les mots employées dans la définition de l'archipel (article 46 b) et sur ce que les détroits de la Mer Egée sont indéniablement eux aussi un ensemble, formant intrinsèquement un tout géographique, il est possible de soutenir cette thèse de l'unité organique du détroit en cause; ce ci ne demande pas un effort d'interprétation plus important que celui fait en 1951 par la Cour

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[198] J.A.deYturriaga, *Straits Used for International Navigation: A Spanish Perspective* (Dordrecht: Martinus Nijhoff Publ., 1991), p. 320; T.Treves, 'La Navigation' in R-J.Dupuy & D.Vignes, *Traité du Nouveau Droit de la Mer* (Bruxelles : Bruylant, 1985), p. 790; (he justifies the system proclaimed by Greece on the basis of the competence of the state bordering the strait to designate traffic separation schemes with the consent of the competent international organisation) ; Alexander notes that some of the straits created in the Aegean archipelago (he refers to the straits of Elafonissos, Kythera and Antikythira straits) may be potentially exempted from the transit passage regime on the basis of article 38 (1) LOSC, without though giving a definite answer or commenting upon the Greek interpretative declaration; L.M.Alexander, 'Exceptions to the Transit Passage Regime : Straits with Routes of Similar Convenience' 18 *ODIL* (1987), p. 485. Jia also states that article 38 (1) may be applicable is some cases but only in straits formed between the mainland and the islands and not between islands. He stresses though that 'Greece can do no more than what Article 38 (1) allows, ie identify alternative routes seaward of each island-mainland strait'; B.B.Jia, *The Regime of Straits in international law* (Oxford: Clarendon Press, 1995). Stelakatos-Loverdos accepts such possibility as an expression of the 'abuse of rights theory' concerning the exercise of transit passage in the case of alternate or lateral straits; he further dissociates this case from the right of archipelagic state to designate sea lanes; M.Stelakatos-Loverdos (1998), p. 84-85.

dans l'Affaire des Pêcheries Anglo-norvégiennes que affirmait pour faire le choix comme laisse de base mer de celle de l'ensemble dit du Skjargaard, plutôt que celle de la terre ferme que les réalités géographiques dictent cette solution'.[199]

3.4 Concluding remarks

Some general remarks may be drawn from the analysis of the practice of continental states in their outlying archipelagos:

The first remark is rather obvious and concerns the diversity in the treatment of outlying archipelagos by continental states. In particular, whereas some continental states have applied a special system for the delimitation of the territorial sea of their outlying archipelagos, other states are applying the low-water rule treating each island of the archipelago as an autonomous feature. Strangely enough, some continental states possessing more than one archipelago have shown a differential treatment in the systems applied in them. The diversity in practice and the differentiation in the treatment of archipelagos by the same state may, however, be explained on the basis of geographical implications presented by archipelagic formations which have influenced the perception of states with regard to the system - or preferably with regard to the rule of law providing for such system - applicable in each case. This issue will be best explained and elaborated in the following Chapter when the contribution of this practice to the evolution of international law will be discussed.

A comment stemming from the latter remark concerns the effect geography has upon the consideration of archipelagos. It is submitted in the present thesis that geographical considerations (and not political) should determine the regime applied to archipelagos. This observation may be illustrated in the instances of state practice examined in the present Chapter. Almost all instances presented and discussed[200] refer to groups of islands which are closely-knit, that is, groups in which the distance between the islands is rather short not exceeding in most cases double the breadth of the territorial sea.

From the analysis of the systems applied in the cases discussed, it may be observed that states have not applied the archipelagic regime as prescribed in the LOSC for

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[199] D.Vignes, 'Le régime des détroits et voies d'eaux artificielles intéressant la Méditerranée et le nouveau droit de la mer' 17 *Thesaurus Acroasium* (1991), p. 450; see also B.Vukas, 'The New Law of the Sea and Navigation ; A view from the Mediterranean', *ibid*, p. 417-8.

[200] The only exception to this observation concerns the system applied by China in the Paracel Islands; see *supra* p. 165-167; see also the straight baselines applied in the northern part of the Galapagos Islands and the comments therein, *supra* p. 140-143.

archipelagic states but have applied the concept of straight baselines (an application of which is article 7 of the LOSC). They, thus, regard the enclosed waters as internal and not as archipelagic restricting the navigational and other rights of third vessels in these waters and only in few cases do they provide for the right of innocent passage. However, the instances of state practice reveal that states are motivated by a broader concept of straight baselines not as embodied in article 7 of the LOSC but presumably as was prescribed by the ICJ in the *Fisheries case*. It, therefore, seems that they are motivated by general principles regarding the application of straight baselines and not by the rather formalistic framework of article 7 of the LOSC.

However, some of the instances of state practice may seem to verify the conclusions reached in Chapter 2 regarding the potential application of article 7 of the LOSC in the case of outlying archipelagos. Despite the rather strict conditions of this article, the application of straight baselines in some archipelagic formations conforms to these conditions. However, geography plays its part in this respect, as it is mainly archipelagic features composed of one or two larger islands and surrounded by smaller islands which meet the requirements for the application of article 7. The exact application of the straight baselines systems as analysed in the present chapter has illustrated the limited ambit of the use of article 7 for dependent outlying archipelagos.

As a final remark it should be noted that despite the geographical multiformity, the practice of these continental states has a common element sufficient to distinguish it from other practices regarding the application of straight baselines. The archipelagic concept – due, it is true, to its vague content - succeeds to an extent in uniting all the geographic types of archipelagos into a legal category in which the application of straight baselines would lead to the unification of enclosed waters in a sovereign regime. The practice of states is inspired by this concept. The fact that the archipelagic concept is latent in such application of straight baselines has been noted by authors examining the particular applications[201] and by states in their protests against such practice.[202] For example, Prescott has stressed that the systems applied by continental states to their

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[201] H.W.Jayawardene (1990), p. 78: 'The effect of such practice has been to blur the distinction between normal straight baselines and archipelagic straight baselines, as it is not clear under what principle the baselines are drawn. A possible basis for rationalisation may be to exclude those examples of enclosure of island groups where a principal dominant 'mainland' island to which smaller increments have been tied, is absent; the validity of such systems being made subject to the general regime of archipelagic straight baselines'.

[202] The protests of states against the practice of continental states will be examined in the next Chapter, p. 237 *et seq.*.

midocean archipelagos may be justified if we accept that the archipelagic concept may be adopted by these states for their midocean archipelagos.[203]

All the above remarks confirm the conclusion reached in Chapter 2 regarding the inadequacy of article 7 of the LOSC to offer a feasible alternative to the lack of a special regime for the delimitation of the territorial sea of dependent outlying archipelagos. They, however, illustrate a different perception shared by states referring to the application of the concept of straight baselines exceeding the strict limits of article 7 and encompassing different geographical situations. This different perspective and the potential law-creating value of state practice will be the study of the following Chapter.

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[203] J.R.V.Prescott, *The Maritime Political Boundaries of the World* (1985), p. 183 (on Houtman and Abrolhos), 315 (on the Canary Islands).

Chapter 4: Customary international law and dependent outlying archipelagos

4.1 INTRODUCTION

Prior to the adoption of the LOSC by the Third Conference of the Law of the Sea, the status of international law with regard to the baseline system to be used for the measurement of the territorial sea of archipelagos was uncertain and the existence of a rule of customary international law regulating this case could be questioned.[1] However, the practice of certain states and the consideration of this practice as *lex ferenda*, as expressed in the discussions of various institutions and international conferences,[2] may demonstrate that international law was at that time in the process of formation. This is acknowledged by Kwiatkowska and Agoes who argued that 'Part IV of the LOSC establishing archipelagic state regime is neither totally old (declaratory) nor totally new (generating), but seems to belong to a medium category of treaty rules which crystallise customary law in process of formation'.[3] The emerging customary international law before the adoption of the LOSC concerned equally archipelagic states and dependent archipelagos since such distinction had not been suggested prior to the UNCLOS III negotiations and therefore, the practice of continental states and archipelagic states was uniformly taken into consideration. The adoption of Part IV of the LOSC regarding the archipelagic regime 'secured' the establishment of a rule of customary international law for archipelagic states, as it is nowadays acknowledged that the archipelagic regime is part of customary international law.[4] The question which arises is whether customary law has developed to address the issue of archipelagos which failed to qualify for the attribution of the archipelagic regime of the LOSC, such as dependent outlying ones.

Ascertaining the existence of custom in international law is a difficult endeavour. The theory of customary international law is conflicting and diverse and the procedure for the ascertainment of the existence of a rule of customary law regulating a particular legal case is ambiguous and uncertain. The ascertainment of customary law is aggravated by the factual implications of the particular case and

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[1] B.Kwiatkowska & E.R.Agoes (1991), p. 58.
[2] See Chapter 1, p. 18-32.
[3] B.Kwiatkowska & E.R.Agoes (1991), p. 55.
[4] See R.R.Churchill and A.V.Lowe (1999), p. 129; B.Kwaitkowska & E.R.Agoes (1991), p. 55-9.

their interpretation concerning the constituent elements of customary law, namely, state practice and *opinio juris*.

Before assessing, however, the status of customary international in the case of dependent outlying archipelagos, the relationship between the LOSC and customary law should be appraised. Particularly, the first part of this Chapter will examine whether customary law may evolve in parallel to the Convention and establish a special system/regime for the delimitation of the maritime zones of dependent outlying archipelagos.

The second part of this Chapter will assess the possibility of the existence of special rules of customary international law concerning particular cases of state practice. As examples of the existence of special rules of customary law, the regimes applied to the Galapagos and the Faroe Islands will be examined. Finally, it will be, assessed whether the existence of various special rules for the baseline systems in particular dependent midocean archipelagos could be deemed as precluding or as reinforcing the emergence of a general rule of customary international law regulating the legal status of dependent midocean archipelagos.

The last part of this chapter will assess the current status of general customary law with regard to dependent outlying archipelagos. This will require the examination of the various elements of customary international law and the assessment whether these elements are present in the case of dependent outlying archipelagos. Particularly, the practice of continental states consisting in the application of straight baseline systems for the delimitation of the maritime zones of their midocean archipelagos, as presented in Chapter 3, and their beliefs regarding the legality of their actions (*opinio juris*) will be examined in conjunction with the reaction of the rest of the states of the international community vis-à-vis this practice. The outcome of this assessment will reveal whether general customary law has, nowadays, been established providing for a special regime for dependent midocean archipelagos.

4.2 The LOSC and customary international law with regard to dependent outlying archipelagos: Interactions and interrelationships

By virtue of article 38 of the Statute of the International Court of Justice, 'international Conventions, whether general or particular, establishing rules expressly recognised by the contesting states' as well as 'international custom, as evidence of a

general practice accepted as law' are recognised as equally important sources of international law. There is, thus, a complementary relationship between conventional and customary rules.

Despite its importance, its broad ratification and its universal application, it cannot be said that the LOSC has regulated all the issues concerning the law of the sea or that there will be no future development regarding various aspects of the law of the sea created by state practice or state needs.[5] The reality is that international law is evolving in accordance with the practice and the needs of states and that issues left unsettled by the Convention may be regulated by general or special customary international law.

Conventional and customary law have been found to interact in a variety of ways.[6] What is not clear, however, is the effect of a new emerging customary law upon the provisions of a contrary valid treaty provision. This uncertainty derives from the lack of an explicit provision in the Vienna Convention on the Law of Treaties with regard to the termination of a prior incompatible treaty by a supervening custom.[7] Nevertheless, it has been argued that since customary law and treaties are autonomous sources of international law, a new customary law may modify a treaty provision.[8]

Thirlway points out that the modification of a pre-existing treaty by a customary law is possible when all the states parties to the Treaty have contributed to the development of the new customary rule 'by acting inconsistently with the treaty or have adopted the customary practice in their relations after the rule has become

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[5] N.Kontou (1994), p. 10.

[6] See M.E.Villiger, *Customary International Law and Treaties* (Dordrecht: Martinus Nijhoff Publ, 1985), p. 38-41. See also M.Mendelson, 'The ICJ and Sources of International Law' in V.Lowe & M.Fitzmaurice, *Fifty years of the International Court of Justice* (Cambridge, Cambridge University Press, 1996), p. 72-79 who discusses the relation between treaty and custom with a reference to the *North Sea Continental Sea cases.* See also *Case Concerning Military and paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America, Judgment of 27 June 1986, Merits) *ICJ Reports*, para. 179.

[7] During the discussions of the ILC with regard to the draft Convention on the Law of Treaties the following provision was proposed: 'The operation of a treaty may also be modified ... (c) by the subsequent emergence of a new rule of customary law relating to matters dealt with in the treaty and binding upon all the parties'. *ILCYB* (1964) Vol. II, p. 198. This provision was finally rejected by the Drafting Committee; see *ILCYB* (1964), Vol. I, Part. II, p. 220. See also N.Kontou (1994), p. 135-139 and M.E.Villiger (1985), p. 107 *et seq.* for a discussion on this issue.

[8] N.Kontou (1994), p. 144. M.E.Villiger (1985), p. 36 (according to Villiger 'modification is the result of a new customary rule having developed on the same subject-matter as the conventional rule, but with different content', p. 215). M.Akehurst, 'Custom as a Source of International Law', 47 *BYIL* (1974-5), p. 275. A.Cassese, *International Law in a Divided World* (Oxford: Clarendon Press, 1986), p. 180. P.Reuter, *Introduction to the Law of Treaties* (London: Kegan Paul Int., 1995), p. 140; R.Bernhardt, 'Custom and treaty in the Law of the Sea', 205 *Hague Recueil* (1987-V), p. 275-6.

established'.[9] He stresses, though, the implications created by the fact that some of the parties to the treaty may have not participated in the creation of the new customary rule; in that case, he argues, it is not certain whether the emerged customary law would be binding upon them.[10] Villiger stresses that due to the non-consensual nature of customary law, the consent of all the states to the modificatory impact of the emerging customary law is not necessary and thus, as soon as this rule is established it will bind all states parties to the treaty.[11] The new customary rule cannot be invoked against a persistent objector but it can be invoked against the states which have remained passive during its formative stage.

The flexible character of the formation of international law and the close interaction between treaty and custom has been presented by Gazzini as following: 'in the case of codification in particular the treaty 'photographs' the customary rule, but neither gives the conventional rule its final and perpetual shape nor freezes the development of the corresponding customary rule ... Customary norms may fill the gaps and offer indications on the content of a treaty even in evolutionary terms. ... On the other hand, subsequent practice of States parties to the treaty may contribute to the development of the relevant customary rules on a larger scale'.[12]

The clearest example in international law regarding the effect of customary law on treaty law concerns the impact customary international law had upon the 1958 Geneva Conventions on the Law of the Sea; customary rules based on state practice were established after the adoption of the 1958 Geneva Conventions modifying the

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[9] H.Thirlway, 'The Sources of International Law' in M.D.Evans (ed) *International Law* (2nd ed.) (Oxford: Oxford University Press, 2006), p. 133-4. In this case, he argues that 'the situation may be analysed as in effect a modification (or even perhaps an interpretation) of the treaty'.

[10] *Ibid.* He does express the view that a newly developed rule which is not *jus cogens* will not affect a pre-existing treaty; he, however, concludes that the point should be regarded as unsettled.

[11] Villiger criticises Thirlway's perspective as excessively contractual ignoring the nature of customary law; M.Villiger (1985), p. 221.

[12] Gazzini, *The changing rules on the use of force in international law* (Manchester: Manchester University Press, 2005), p. 120 (the references have been omitted). Similarly, G.M.Danilenko, *Law-making in international law* (Dordrecht: Martinus Nijhoff, 1993), p. 137-142: 'Customary rules would seem to exist alongside many treaty provisions, influencing the interpretation and application of those provisions and in some cases modifying their content'. The effect of the parallel existence of rules where the new rule influences the application of the older rule without necessarily modifying it has been stressed by Thirlway: 'A new customary rule need not and in most cases does not grow up in a field previously unregulated by international law; nor if there is an existing rule, need it overturn that rule – as being what Virally has neatly termed the *lex delenda* – and substitute itself for it. It is much more common for a new rule to graft itself on to existing law tempering, limiting or extending the effect of existing rules' (references omitted); H.Thirlway, 'The Law and Procedure of the International Court of Justice' 61 *BYIL* (1990), p. 83.

rules enshrined in the Conventions.[13] Bernhardt characteristically pointed out that the 1958 Conventions on the Law of the Sea were binding for the parties to them 'only to the extent that the treaty law has not been substituted by later customary law'.[14]

Summing up the above observations, it may be argued that if no conflict arises between a rule deriving from a treaty and a rule of customary law, both sources of international law will be equally applied and states will be bound by them. It should be kept in mind that it is always an issue of interpretation whether there is indeed a conflict between rules prescribed by different sources of law. According to Villiger, 'a conflict arises when a customary and a treaty rule on the same subject-matter regulate a situation with different ie incompatible or contradictory results'. [15]

When there is, indeed, a conflict between treaty and customary law regarding the regulation of a specific issue (effect *contra legem*), two principles may be applied. Firstly, the principle *lex posterior derogat legi priori* is applicable to the case where a customary law established after the entry into force of the treaty treats an issue in a different way than the rule embodied in the treaty.[16] The difficulty in the application of this principle concerns the determination of the exact moment of the establishment of a rule of customary law.[17] The principle of *lex specialis derogat legi generali* may also be applied in the case where the subsequent established customary rule entails a special provision in comparison to the general rule prescribed in the convention. According to this principle, the rule that provides for a specific regulation of a subject

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[13] Bernhardt refers to the example of the Exclusive Economic Zone or Exclusive Fishery Zone stating that despite the fact that the 1958 Conventions did not provide for them, both states members to the Convention and non-member states could invoke the rights deriving from the customary law rule providing for the relevant rights for states on fishery zones; R.Bernhardt (1987), p. 276. Similarly N.Kontou (1994), p. 37 *et subs*. In the *Fisheries Jurisdiction case* the ICJ accepted that fisheries zones had evolved to be considered as part of customary international law having modified article 2 (2) of the High Seas Convention regarding freedom of fishing; *Fisheries Jurisdiction case* (UK v. Iceland, Judgment of 25th July 1974, Merits) *ICJ Reports*, p. 22-23, para. 50-4; see also Villiger (1985), p. 213-4.

[14] R.Bernhardt (1987), p. 280.

[15] M.E.Villiger (1985), p. 36, 215.

[16] *Ibid*, p. 36, p. 214 (see also reference mentioned therein, note 85). See also M.N.Shaw (2003), p. 116. Thirlway describes this process as following: 'It is the increasing number of cases in which the codified law 'does not fit' in which it is natural and proper to apply a different rule, which eventually gives the new rule the status of law enabling it to override the codified law on the general principle that *lex posterior derogat legi priori*', H.Thirlway, *International Customary Law and Codification* (Leiden, A.W.Sijthoff, 1972), p. 131.

[17] *Ibid*, p. 36. Villiger points out that such a difficulty is enhanced 'when a diplomatic conference adopts a convention and at the same time provides the framework for the crystallization of customary law'.

will prevail over the general one regardless of the nature of the rule, that is whether it is treaty or customary law[18] and regardless of the posteriority of any of these rules.[19]

Regarding the relationship between the LOSC and customary international law, the Convention itself affirms in its preamble that 'matters not regulated by this Convention continue to be governed by the rules and principles of general international law'.[20] The meaning of general international law in this provision refers primarily to customary international law.[21]

Despite the fact that, as argued in Chapter 1, where the *travaux préparatoires* of UNCLOS III were analysed, the issue of whether a special system should or could be applied to dependent outlying archipelagos may be considered as unsettled, the LOSC does not entail any provision concerning the application of a special system for the delimitation of the territorial sea of groups of islands and thus with the exception of article 7, continental states shall apply the low-water mark on the basis of article 5 in their outlying archipelagos. It is argued by Jayawardence that in the absence of a provision within the LOSC and 'in view of the strong opposition to the extension of the concept (he refers to the archipelagic concept), unilateral proclamations are likely to pre-empt the issue'.[22] Indeed, as presented and analysed in Chapter 3, states have applied straight baselines to their outlying archipelagos in a way to reflect the archipelagic concept, encircling groups of islands with straight baselines and considering them as a compact whole for the delimitation of the territorial sea. Kwiatkowska and Agoes referring to these claims of continental states stated that this practice, although not conforming to the LOSC may result in the emergence of new customary rules.[23]

Indeed, potential rules of customary law establishing a special system for dependent outlying archipelagos would be in conflict with the LOSC. Is it possible for

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[18] M.Akehurst (1974-5), p. 275; N.Kontou (1994), p. 141-3; M.N.Shaw (2003), p. 116; A.Cassese (1986), p. 180.

[19] Therefore, it has been argued that *lex posterior generalis non derogat legi priori speciali.* See D.P.O'Connell & I.A.Shearer (ed), *The International Law of the Sea* Vol. I (Oxford: Oxford University Press, 1982), p. 47. M.E.Villiger (1985), p. 36. N.Kontou (1994), p. 143-4.

[20] Furthermore, it has been acknowledged that the LOSC has either codified already existing customary international law or has contributed to the creation of new rules of customary law. R.R.Churchill & A.V.Lowe (1999), p. 24. See also R.Bernhardt (1987), p. 282-319, where he examines the relationship between the LOSC and customary international law with regard to specific fields such as baselines, the territorial sea, the continental shelf etc. See also L.T.Lee, 'The Law of the Sea Convention and Third States', 77 *AJIL* (1983), p. 542-3, 561 *et subs.*

[21] See the meaning of the exact provision embodied in the preamble of the Vienna Convention on the Law of Treaties in A.Aust (2000), p. 9-10.

[22] H.W.Jayawardene (1990). p. 142.

[23] B.Kwiatkowska & E.R.Agoes (1991), p. 39; see also R.R.Churchill & A.V.Lowe (1999), p. 120-121.

the new emerging customary law to supersede the provisions of the Convention? According to the above comments on the general relationship between treaty and customary law and the positive assumption that treaty law and customary law as autonomous sources of international law may have an effect on each other, two principles may be applicable: *lex posterior derogat legi priori* and *lex specialis derogat legi generali*.

According to the first principle, the customary international law established after the entry into force of the LOSC will prevail as 'posterior' to the one provided for in the LOSC.[24] Applying the second principle, the result will be the same. A rule of customary rule attributing specific rights to continental states regarding the treatment of their midocean archipelagos will prevail as special *ratione materiale* against the general provisions of the LOSC regarding baselines.

A last consideration will be made regarding the effect of regional customary law[25] upon the LOSC with regard to the issue of midocean archipelagos. Regional customary law binds only a limited number of States in contrast to customary law of general application, which has a universal spectrum and binds all the states of the international community. It either creates a rule totally new if there is a '*lacuna*' in general international law regarding the specific question, or it derogates from a rule of general customary international law.[26] In this case, the principle of *lex specialis ratione personae* will be applied and therefore, the rule of regional customary law, special as it is in comparison to the general rule embodied in the LOSC, will prevail over the general provisions of the LOSC.

Special or particular customary law - being different from regional customary law in the sense that the former is of general application binding all the states of the international community (persistent objectors have arguably the right to 'opt out') regulating though a individualised case deemed to merit special treatment - should

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[24] As mentioned above, the customary law before UNCLOS III was uncertain; see *supra* p. 180, note 3.
[25] The ICJ has acknowledged the possibility of the existence of regional customary law in many cases: see for example, *Asylum case* (Colombia v. Peru, Judgment of 20 November 1950) Reports of the ICJ, p. 276-8, *Case Concerning the Right of Passage over Indian Territory* (Portugal v. India, Judgment of 12 April 1960), *Reports of Judgments, Advisory Opinions and Orders*, p. 6; *Case Concerning the Land, Island and maritime Frontier Dispute* (El Salvador v. Honduras, Nicaragua intervening, Judgment of 11 September 1992) *Reports of Judgments, Advisory Opinions and Orders*, p. 586-606. See also A.D'Amato, 'Special Custom in International Law', 63 *AJIL* (1969), p. 212; M.Akehurst (1974-5), p. 1; I.Brownlie (2003), p. 12; M.N.Shaw (2000), p. 87-88; A.Cassese (2001), p. 119; M.Mendelson, 'The formation of Customary International Law', 272 *Hague Recueil* (1998), p. 71-2; N.Kontou (1994), p. 3-4.
[26] G.Cohan-Jonathan, 'La Coutume Locale', 1961 *Annuaire Francais de Droit International*, p. 135.

also be considered as prevailing over the provisions of the LOSC as *lex specialis ratione materiale*.[27]

It was argued in this subsection that even if the LOSC prescribes solely a regime for archipelagic states, customary international law may evolve (or continue to evolve) and regulate a special regime for the case of dependent outlying archipelagos. This presupposition only suggests that the possibility of the evolution of customary law in this field is feasible. The reality of this presupposition concerning both the establishment of general and special rules of customary law will be appraised in the following subsections.

4.3 Special customary international law and dependent outlying archipelagos

4.3.1 General comments on special customary law

Fitzmaurice refers to a case of special rights 'different from, and in principle contrary to, the ordinary rule of law applicable, ... built up by a particular State or States through a process of prescription – leading to the emergence of a usage or customary or historic rights in favour of such State or States'.[28] McGibbon commenting on the category suggested by Fitzmaurice states that 'the concepts of prescription, customary right and historic right overlap'.[29] In this respect, special customary rules of law may be binding upon the whole of the international community and at the same time refer to and regulate a particular and individualised situation.[30] Special customary law does not coincide with the so-called regional or

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[27] For an analysis of the concept of special customary rules see *infra* p. 187 *et seq*..

[28] G.Fitzmaurice, 'The Law and Procedure of the ICJ, 1951-54: General Principles and Sources of Law' 30 *BYIL* (1953), p. 68; Fitzmaurice accepts that historic rights evolve through the process of prescription. In its Study on historic waters the UN Secretariat expressed a contrary view with regard to the applicability of the process of prescription in the development of claims upon historic waters;, Juridical regime of Historic Waters, Including Historic Bays, Study prepared by the Secretariat, UN Doc. A/CN.4/143 (Yearbook of the ILC, Vol. II, 1962), p. 1p. 11-12.

[29] I.C.McGibbon, 'Customary International Law and Acquiescence' 33 *BYIL* (1957), p. 122. See also Blum who regards historic rights as a category of special customary rights: Y.Z.Blum, *Historic titles in international law* (The Hague: Martinus Nijhoff, 1965), p. 52; K.Wolfke, *Custom in Present International Law* (2nd ed.) (Dordrecht: Martinus Nojhoff Publishers, 1993), p. 92. Thirlway similarly suggests that 'if practice apparently inconsistent with a general rule shows enough internal consistency it may reveal the existence of a local or special custom differing from the general rule; or of an exception to the general rule where special circumstances exist (eg, the preferential fishing rights of a coastal state exceptionally dependent on fishing resources)'. H.Thirlway (1990), p. 82.

[30] K.Wolfke (1993), p. 92. Wolfke refers to these rules as 'exceptional customary rules of international law'. On the contrary, Cohen-Jonathan considers that these rights should not be differentiated from general rules of customary international law, which, as he contends, may regulate a concrete, localised and individualised situation. In his regard the important differentiating element between special and general customary international law is the circle of states bound by the rules. As an example for the

local customary law (which is also referred to as special or particular customary law[31]), since the latter is accepted to be binding upon a restricted group of states.[32]

Rules of special customary law differ from those of general customary law in the sense that they are established 'with the view to creating an exception to the prevailing general rules because of special circumstances peculiar to certain States only'.[33] Fitzmaurice, clarifying the notion of the exception in a juridical sense, asserted that it may denote not 'the unusual case or exceptional circumstances merely as such, but the exception created or recognised by the law itself. Such an exception, in spite of the apparent paradox, is part of the rule to which it relates. It is, in fact itself a rule or sub-rule – included in the legal complex applicable to a given category of situation'.[34]

The possibility of the existence of an exception provided by the law itself was recognised by the ICJ in the *Fisheries case*. In this case, the Court did not refer expressly to the existence of a custom according to which Norway had the right to apply a system of straight baselines in its exceptional coast,[35] but referred to specific elements of custom such as time and acceptance of the system by the other states; the Court ruled that 'the method ... established in the Norwegian system ... had been consolidated by a *constant and sufficiently long practice*, in the face of which *the attitude of governments bears witness to the fact that they did not consider it to be contrary to international law* (emphasis added)'.[36] However, the Court regarded the

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case of a rule of general application regulating an individualised situation he refers to a rule permitting a state to draw its baseline for the delimitation of its territorial waters in a particular way: G.Cohen-Jonathan (1961), p. 120. On the contrary, Wolfke refers to the right to a special delimitation of the territorial sea as a case of special customary law, *ibid*, p. 92. However, the name to be given to the customary rule, that is either general or special, is of no importance as long as it is agreed that its characteristics are the same, that is individualised content and general binding effect.

[31] See for example K.Wolfke (1993), p. 88-90; M.Akehurst 1974-5), p. 28-9; M.E.Villiger 91985), p. 33-4.

[32] G.Cohen-Jonathan (1961), p. 120. A.D'Amato (1971), p. 233 *et seq*.. I.Brownlie (2003), p. 12; M.N.Shaw (2003), 87-88; A.Cassesse (2001), p. 119; M.Mendelson (1998), P. 71-2; N.Kontou (1994), p. 3-4. See *supra* note 25 for the decisions of the ICJ regarding the existence of regional customary law; see also H.Thirlway (1972), p. 140.

[33] N.Kontou (1994), p. 5-6. She specifically points out that 'special customary rules are by definition a derogation from existing general law'. See also G.Fitzmaurice (1953), p. 68. The UN Secretariat in its Study on Historic Waters rejected the fact that historic rights constitute an exception to the general rules of international law invoking the instability in international law with regard to the rules applicable for the delimitation of the territorial sea; *Study prepared by the Secretariat on Historic Waters*, p. 7-10.

[34] G.Fitzmaurice, 'The general principles of international law considered from the standpoint of the rule of law', 92 *Hague Recueil* (1957-III), p. 108-9.

[35] D'Amato refers to the *Fisheries case* as a case of special custom: A.D'Amato (1971), p. 261-2.

[36] *Fisheries case*, p. 139; see I.Brownlie (2003), p. 158. Of relevance is the argument raised by Norway during the proceedings as referred by the Court in its judgment: 'The Norwegian Government does not rely upon history to justify exceptional rights, to claim areas of sea which the general law would deny;

system applied by Norway as compatible with general international law and particularly, the Court stated that it 'is unable to share the view of the United Kingdom Government, that 'Norway, in the matter of baselines now claims recognition of an exceptional system' ... (but) all that the Court can see therein is the *application of general international law to a specific case* (emphasis added)'.[37]

In the case of dependent outlying archipelagos, the states which have applied a straight baseline system around their archipelagos have perceived their practice not as an exception *to* the law regarding baselines but as an 'exception created or recognised by the law itself'.[38] Therefore, these states, while not denying the general applicability of the low-water mark rule, argued for the application of an *exception within the rule* for their special circumstances.[39] Each particular case could be understood as the application of a special custom in international law according to which each state would be entitled to a 'modified' application of the general rules. However, in order to verify whether this special customary rule exists in each case, it is necessary to consider whether the practice of these states meets the conditions for the establishment of special customary law.

The process for the formation of special customary rights resembles the procedure of the formation of general customary international law[40] with the particularity that the time element[41] and acceptance by the other states play a much more important role. With regard to the latter, Fitzmaurice points out that 'the element of consent, that is to say, acquiescence with full knowledge on the part of other States is not only present, but necessary to the formation of the right'.[42] McGibbon stresses that 'in place of general participation which raises strongly the presumption of consent with regard to general customary rights, special and exceptional customary rights are validated entirely by the consent or acquiescence of the states affected

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it invokes history together with other factors, to justify the way in which it applies the general law': *Fisheries case,* p. 133.

[37] *Fisheries case,* p. 131.

[38] G.Fitzmaurice (1957), p. 108-9. For the perception of these states regarding the validity of their claim see *infra* p. 222 *et seq.* on the analysis of the *opinio juris.*

[39] See G.Fitzmaurice (1957), p. 108.

[40] G.Fitzmaurice (1953), p. 31, footnote, 3. I.C.McGibbon, 'The Scope of Acquiescence in International Law' 31 *BYIL* (1954), p. 52-3; Y.Z.Blum (1965), p. 52-3.

[41] Blum contends that the time factor assumes a much more important role in the formation of special customary rights than in the evolution of general customary law; Y.Z.Blum (1965), p. 53-4. See also *Study prepared by the Secretariat on Historic Waters*, p. 18; M.W.Clark, *Historic Bays and Waters: A regime of recent beginnings and continued Usage* (N.York: Ocean Publications, 1994), p. 122-3.

[42] Fitzmaurice (1953), p. 28, 68-9. See Blum for an account of the views of international scholars, international bodies and tribunals regarding the prominent role of acquiescence as the juridical basis of historic rights, Y.Z.Blum (1965), p. 60-89.

manifested in relations to a passage of a comparatively prolonged period of time'.[43] Therefore, the formation of special customary law requires the convergence of the following elements: consistent and effective practice manifested for a comparatively prolonged period of time[44] and absence of opposition or acquiescence on behalf of other states.

Churchill and Lowe, referring to the practice of continental states and the application of straight baseline systems in their midocean archipelagos, point out that 'to the extent that such claims have been recognised by other States, they must be regarded as being valid under customary international law'.[45] These authors emphasise the notion of acceptance of the applied system by the other states of the international community as an element 'legalising' the particular system in international law via the establishment of a custom. Therefore, they seem to suggest that each case of application of straight baselines by a continental state may be validated by a 'special' customary rule appertaining to the specific situation as long as the other states of the international community have consented to or acquiesced in this system.

In order to illustrate how special customary rules may evolve and regulate individual cases with regard to dependent midocean archipelagos, the cases of the Faroe Islands and the Galapagos Islands will be examined. Denmark and Ecuador were the first states in the international community to apply the archipelagic concept by treating their archipelago as a whole for the measurement of the maritime zones. What is more, in the case of these two archipelagos the evidence for the acceptance of the applied regime by other states is strong. It should, however, be stressed that the focus on these two examples does not preclude that other cases of special customary law might also exist.

4.4.3 The case of the Faroe Islands

The legislation by virtue of which Denmark applied a straight baseline system in the Faroe Islands and the exact application of such system was set out in Chapter 3.[46]

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[43] I.C.McGibbon (1957), p. 123.

[44] However, Blum observes that the time factor loses its significance 'in cases where a departure by a state from the generally accepted rules of internal law has met with the explicit approval of the states which are likely to be affected by such a departure' or 'in cases, where, without explicitly consenting the affected state has acted in such a manner that its consent can be inferred in a positive sense from its actions', Y.Blum (1965), p. 54.

[45] R.R.Churchill and A.V.Lowe (1999), p. 121.

[46] See Chapter 3, p. 43-146.

It was illustrated that Denmark, through consecutive orders and decrees established a straight baseline system encircling the archipelago and is treating the enclosed waters as internal. Thus, in so far as it has been evidenced that Denmark has established and consistently enforced the straight baselines system in the Faroe archipelago for a sufficiently long period of time (more than 100 years), the validity of this system will depend upon its acceptance by the states of the international community.

Denmark has signed a series of agreements with its neighbouring countries regarding the delimitation of the maritime space between the Faroe Islands and these states. In these agreements, a reference to the baselines of the Faroe Islands, as established by Denmark, is repeatedly made and the delimitation between the overlapping maritime zones is effected on the basis of the established straight baselines around the Faroes.

In 1979 Denmark and Norway signed an agreement regarding the delimitation of the continental shelf and the Fishery Zone and EEZ of the two states.[47] In the second paragraph of the preamble it is mentioned that the two parties 'will not establish the boundary farther north than to the point which lies 200 n.m. from the nearest points *of the baselines from which the width of the Contracting Parties' territorial sea is measured'* (emphasis added). Following, in article 1 the parties have agreed that the continental shelf boundary will be the median line 'which is defined as the line equidistant at each of its points from the nearest points *on the baselines from which the width of the Contracting Parties' territorial sea is measured'*. It seems, therefore, that Norway has accepted the method applied by Denmark with regard to the delimitation of the territorial sea around the Faroe archipelago. This conclusion may also be inferred from the wording of article 2, which elaborates the exact use of the median line as the maritime boundary between the two states. In this article it is mentioned that the south end-point of the boundary line will be 'equidistant from the nearest points on the baselines *from which the territorial sea of the Kingdom of Denmark near the Faroe*, of the Kingdom of Norway and of the United Kingdom of Great Britain and Northern Ireland *is measured'* (emphasis added).

The position of the UK on the issue is more complicated. In an Exchange of Notes of 22 April 1955 between the Danish Government and the United Kingdom regarding the exclusive fishery zone of the Faroes, the two parties agreed that straight

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[47] UK/Norway Delimitation Agreement (15 June 1979) found at www.un.org/Depts/los/ LEGISLATIONAND TREATIES/STATEFILES/DNK.htm.

baselines would delimit the outer limits of the zone, based on the islands as a group and arcs of circles would apply to round off the limits where two straight lines met.[48] Evensen pointed out that even though a straight baseline system was not explicitly applied, the agreement reflected the rules laid down by the ICJ in the *Fisheries case* regarding the application of a baseline system following the general direction of the coast and not its sinuosities.[49]

However, following the extension of their fishing zones to 200 n.m. in 1977 and the creation of overlapping zones, a disagreement arose between the UK and Denmark regarding the baselines for the measurement of the breadth of the fishing zones.[50] During the negotiations for the conclusion of a maritime delimitation agreement, the UK disputed the straight baselines in the eastern and western part of the Faroe Islands as the baselines to be used for the maritime delimitation between the two states.[51] However, in the Agreement signed on 18 May 1999[52] it was settled that 'the continental shelf in the area between the Faroe Islands and the United Kingdom within 200 n.m. (would be measured) *from the baselines from which the territorial sea of each Party is measured*' (emphasis added).[53] Particularly, in the eastern part of the overlapping zones, full weight was accorded to the straight baseline in the eastern part of the Faroe archipelago. Furthermore, the straight baseline in the western side of the archipelago was again taken into consideration in the delimitation process.[54] It could be, therefore, inferred from the delimitation agreement between the UK and Denmark that the former has recognised, despite its initial reservations, the straight

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[48] J.Evensen (1958), p. 297-8.
[49] *Ibid.*
[50] Before extending their fishing zones to 200 n.m., the UK and Denmark had agreed through an exchange of notes in December 1976 that the median line should be used for the delimitation of their maritime zones. For an analysis of the dispute and the negotiation following to the 1999 agreement see A.G.Oude Elferink, 'Maritime Delimitation Between the United Kingdom and Denmark/Faroe Islands', 14 IJMCL (1999), p. 541 *et seq.*.
[51] *Ibid*, p. 541-2.
[52] The Denmark (Faroe Islands) / UK Delimitation Agreement (1999) may be found at www.un.org/Depts/los/LEGISLATIONAND TREATIES/STATEFILES/DNK.htm. The UK by the Fishery Limits Order of 1999 and The Continental Shelf (Designation of Areas) Order of 1999, amended its legislation with regard to the fishery limits and the continental shelf boundary respectively to reflect the fore-mentioned agreement between the UK and Denmark. Both of these Orders may be found at www.un.org/Depts/los/LEGISLATIONAND TREATIES/STATEFILES/ENG.htm
[53] *Ibid*, second paragraph of the preamble.
[54] The overlapping area in this part of the delimitation was greatly reduced after the change of the position of the UK with regard to the generation of maritime zones from the Rockall Islands; finally, the overlapping area was divided into equal halves.

baselines system applied by the latter for the delimitation of the territorial sea of the Faroe archipelago.[55]

The United Kingdom and the Kingdom of Norway have also signed an agreement regarding the delimitation of the continental shelf between the two countries.[56] In article 2 of the Supplementary Protocol[57] there is a mention to the Faroe Islands with regard to the delimitation of the continental shelf in a point where the continental shelf of the UK, Norway and Denmark, with respect of the Faroe, converge. Particularly, it is provided that 'in the north, the termination point of the dividing line between the continental shelves of the United Kingdom and the Kingdom of Norway shall be point No. 26, the point which is equidistant from the nearest *points of the baselines from which the territorial sea* of the United Kingdom and the Kingdom of Norway and *the Kingdom of Denmark, in respect of the Faroe Islands, is measured* (emphasis added). The position of point No. 26 shall be subject to acceptance by the Government of the Kingdom of Denmark'. It may be argued that both the UK and Norway have accepted and recognised the method applied by Denmark in the Faroe Islands for the delimitation of the territorial sea.

There is also a mention to the Faroese baselines drawn by Denmark in a law promulgated by Iceland. Particularly, Article 7 of Part IV of Law No. 41 of 1 June 1979 concerning the measurement of the territorial sea, the Economic Zone and the Continental Shelf, provides that 'where the distance is less than 400 n.m. between the *baselines of the Faroe Islands* (emphasis added) and Greenland on the one hand and of Iceland on the other hand, the economic zone and the continental shelf of Iceland shall be delimited by the equidistant line'.[58]

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[55] Oude Elferink disagrees with this conclusion and states that 'the fact that full weight was accorded to this straight baseline does not necessarily imply that both parties agree on its status, especially as such effect was accorded within the framework of the overall settlement of all delimitation issues within 200 n.m. from the coasts of the parties'. However, he notes that the overall settlement concerned the effect to be given to the baselines and not their existence and the final solution to the boundary dispute was implemented in the agreement without any modifications of the Faroese baselines; A.G.Oude Elferink (1999), p. 549.

[56] The UK/Norway Delimitation Agreement (10 March 1965) may be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/GBR.htm.

[57] Protocol supplementary to the UK/Norway Delimitation Agreement of 10 March 1965 (22 December 1978); the text of the protocol may be fount at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES /STATEFILES/GBR.htm.

[58] Law No. 41 of 1 June 1979 concerning the Territorial Sea, the Economic Zone and the Continental Shelf found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/ISL.htm. The same provision appeared in article 1 of the Regulations enacted by Iceland on 15 July 1975 concerning the Fishery Limits off Iceland, found at K.R.Simmonds (ed), *New Direction of the Law of the Sea*, Vol. IV, (London : Oceana Publ., 1983), p. 29.

The acquiescence in the baselines around the Faeroes by the states in the region may also be inferred by various fishing agreements signed between Denmark and other states concerning mutual fishery relations. Particularly, the EEC, Norway, Germany, the former USSR, Lithuania and Estonia have all individually concluded agreements with Denmark and the Government of the Faroe Islands.[59] In these agreements it is provided in general terms that 'each party shall grant access to fishing vessels of the other Party to fish within its area of *fisheries jurisdiction'* (emphasis added). It seems that by signing these agreements, these states have mutually recognised the limits of the fishing zones, which are naturally measured from the baselines as established by each state, and therefore it may be assumed that third states have implicitly recognised the baselines system applied by Denmark in the Faroes.

However, this conclusion might be obscured by the existence of a provision similarly drafted in all agreements, which prescribes that the agreement shall not 'affect or prejudice in any manner the views of either party with respect to any question relating to the Law of the Sea' or 'with regard to the United Nations Convention on the Law of the Sea'. It is difficult to infer from such general and ambiguous provision any opposition of the state parties against the baseline system applied by Denmark in the Faroe specifically since these states have not raised any protest or have not reserved their rights with regard to the delimitation of the maritime zones around the Faroe Islands. The fact that those states have accepted, by virtue of the agreements and primarily in practice, the limits of the fishing zone around the Faroes means that they have accepted – at least *de facto* – the baselines applied by

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[59] See 1977 EEC-Denmark/Faroes Agreement of fisheries; 1992 Estonia-Denmark/Faroes concerning mutual fishery relations; (the text of these agreements may be found at www.intfish.net/treaties/bilaterals); 1986 Germany-Denmark/Faroes Agreement concerning mutual fishery relations (found at UN Treaty Series, Vol. 1486, I-25474, p. 91); 1977 USSR-Denmark/Faroes Agreement concerning mutual fishery relations (found at UN Treaty Series Vol. 1122, I-17474, p. 172); Faroes-Norway Agreement on Mutual Fishery Rights, 1979 (mentioned by R.R.Churchill & A.V.Lowe (1999), p. 121); 1993 Lithuania-Denmark/Faroes Agreement on mutual fisheries relations (found at www.fao.org/fishery/countrysector/FI-CP_FO/6). See also the Convention on Future Multilateral Cooperation in North-East Atlantic Fisheries (1981) where the participating states seem to have arguably accepted the limits of coastal fisheries jurisdiction in the area in which the Convention applies; the Convention notes that 'the coastal states of the North-East Atlantic have, in accordance with relevant principles of international law, extended their jurisdiction over the living resources of their adjacent waters to limits of up to two hundred nautical miles *from the baselines from which the breadth of the territorial sea is measured* (emphasis added)' (the following states are parties to this Convention: EEC, Denmark (on behalf of the Faroes and Greenland), Iceland, Norway and the Russian Federation); the text of the Convention and information on its status may be found at http://www.intfish.net/000/members/treaties/3113.htm).

Denmark around the Faroe Islands. Therefore, the above-mentioned provision should not be interpreted as an objection to the baseline systenm especially as in practice this system has been accepted and has never been officially or unofficially objected.

The rest of the states of the international community – with the exceptions of the USA whose reaction will be dealt below – have never protested against the straight baseline system applied in the Faroe Islands.[60] What is more, Denmark has been enforcing its jurisdiction in the internal waters and the maritime zones around the archipelago without giving rise to any incidents.[61]

The US Government has raised its objections and officially protested against the application of a straight baseline system around the Faroe Islands.[62] It has also in one occasion in 1991 actively challenged the baseline system of the Faroe Islands.[63] Protests have been found to play a more important role in the formation of special customary law and particularly, it is argued that protests may prevent the establishment of a rule of special customary rule.[64] However, a protest from one state cannot be deemed as a sufficient means for the impediment of the acquisition of special or historic rights[65] particularly in the case whether the exercise of this right affects the interests of more states. In order to invalidate the establishment of such a right, the protest must be raised by a number of states[66] at the initiation of the practice and must be repeated over time.[67] Therefore, the protest of a single state cannot impede the establishment of special customary rights especially since the particular

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[60] As pointed out by the Counsellor of the Legal Service of the Danish Ministry of Foreign Affairs in a personal communication through email, no comments were received by other states after the expansion of the territorial sea around the Faroe Islands in 2000 which was published through DOALOS and circulated in a Note to foreign Embassies.

[61] *Ibid.* See the only instance of operational challenge of the straight baseline system by the US, *infra* note 63.

[62] See *infra* for the wording of the US protest, p. 237. The US State Department criticised the system applied by Denmark by virtue of the 1963 Decree on the ground that the 'so-called' archipelago principle is not compatible with international law: *Limits in the Seas, No. 19 Straight Baselines: Denmark* (US Department of State, Office of the Geographer, Bureau of Intelligence and Research, 1970), p. 3.

[63] Information found at the Defense Technical Information Centre of the US Department of Defense and particularly in the following website: http://www.dtic.mil/whs/directives/corres/20051m_062305 /Denmark_Dependencies.doc.

[64] I.C.McGibbon, 'Some observations on the part of protest in international law', 30 *BYIL* (1953), p. 307 (referring to the acquisition of prescriptive or historic rights). M.Akehurst (1974-5), p. 39. See also *Fisheries case*, p. 138 *et seq.*

[65] Y.A.Blum (1965), p. 159-160.

[66] The UN Secretariat in its study on historic waters pointed out that 'it is a matter of judgment depending on the circumstances of the particular case how widespread the opposition must be to prevent the historic title from materialising'; *Study prepared by the Secretariat on Historic Waters*, p. 17.

[67] See *infra* the analysis of protests in the case of formation of general customary law, p. 236 *et seq.*

system has been accepted by some states and has not been protested by any other state of the international community.

The acceptance of this system by states having vital interests in the region in terms of fishing[68] in combination with the silence of the rest of the states over a period of many years could be interpreted as acceptance of the right of Denmark to measure its maritime zones from baselines encircling the archipelago and subsequently of its right to consider the enclosed waters as internal waters.

Therefore, the straight baseline system as applied by Denmark in the Faroe Islands must be regarded as valid under special customary law.[69]

4.3.3 The case of the Galapagos Islands

The various laws establishing, elucidating and consolidating the straight baseline system applied in the Galapagos Islands by Ecuador have already been set out in Chapter 3. The first Decree referring to the consideration of the archipelago as a compact whole for delimitation purposes traces back to 1934; similar legislation was reiterated in 1938, in 1951, in 1955 and finally the exact coordinates of the baselines joining the basepoints at the salient points of the islands in the outline of the archipelago were determined by decree in 1971. It is true that the exact straight baseline system was not officially promulgated until the enactment of the 1971 Presidential Decree specifying the exact basepoints on the islands for the drawing of the straight baselines. However, even before that date, Ecuador was using such a system in its practice.[70]

Therefore, Ecuador has been applying a special system for the delimitation of the maritime zones of the archipelago since 1934, that is, over a period of 70 years, which can be regarded as a sufficiently long period for the establishment of special customary rights in the Galapagos.[71]

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[68] M.Akehurst (1974-5), p. 40 referring to the *Fisheries Jurisdiction cases,* p. 397-8: 'Acquiescence by a State whose interests are greatly affected is more significant than acquiescence by a State whose interests are only slightly affected'.

[69] Churchill and Lowe seem to agree with this; R.R.Churchill & A.V.Lowe (1999), p. 121.

[70] In the 1951 Presidential Decree, Ecuador specified that the territorial sea would be measured from the salient points of the archipelago. Commenting on this decree, Evensen in his preparatory document for the First Geneva Conference on the Law of the Sea, pointed out that the system used by Ecuador consisted of straight baselines around the archipelago having as basepoints the extreme points of the islands in the outline of the archipelago. J.Evensen (1958), p. 298.

[71] The UN Secretariat stated in its document on historic waters that the length of time is a matter of judgement and that 'no precise time can be indicated'; *Study prepared by the Secretariat on Historic waters*, p. 18. In the *Fisheries case* the ICJ accepted that 'for a period of more than sixty years' the

As mentioned above, consent or acquiescence of third states is an essential element for the establishment of special customary rights; in this respect, attention should now turn to the reaction of the international community vis-à-vis the practice of Ecuador.

To begin with, there are some states which seem to have accepted this practice. Particularly, on 18 August 1952, Chile, Peru and Ecuador signed a Tripartite Declaration on the Maritime Zone (known as the Santiago Declaration), which provided for a zone of exclusive sovereignty and jurisdiction over the sea to a minimum of 200 miles from the coasts of these countries.[72] With regard to the insular territories article 3 (IV) provided that 'the 200-miles zone shall apply to the outline of an island *or group of islands* (emphasis added)'.[73]

During UNCLOS III, Peru explicitly referred to the effect of the Santiago Declaration on the case of archipelagos. Particularly, the Peruvian delegate lent his support to the way Ecuador had resolved the problem of the Galapagos Archipelago regarding the treatment of the archipelago as a whole for the delimitation of the maritime zones.[74] He specifically pointed out that such practice was logical and just and that his delegation fully supported it.[75] Chile also supported the proposals made by Ecuador during UNCLOS III for the adoption of a special regime for dependent midocean archipelagos.[76]

An implicit acceptance of the system applied by Ecuador may also be inferred from the Declaration of Montevideo on the Law of the sea[77] signed in May 1970 by Argentina,[78] Brazil, Chile, Ecuador, El Salvador, Panama, Peru, Nicaragua and Uruguay, in which these states declared the right of the coastal state to raise claims upon the sea and the seabed adjacent to its coast in order to protect and preserve its natural resources. Despite the fact that this declaration concerned primarily the

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United Kingdom Government did not contest the Norwegian system of delimiting the territorial sea; *Fisheries case*, p. 138.

[72] Article 3 (II) of the Declaration on the Maritime Zone of 18th August 1952, found at the website of the Permanent Commission for the South Pacific (www.cpps-int.org/english/santiagodeclaration 2002.html).

[73] *Ibid*, Article 3 (IV).

[74] Official Records of the Third Conference on the law of the Sea, Vol. II, Summary Records, Second Committee, 37th Meeting, para. 23, p. 268,.

[75] *Ibid.*

[76] See the document co-sponsored by Chile; UNCLOS III Off.Rec., Vol. III, Doc. A/CONF.62/L.4, p. 82-3.

[77] The text of the declaration may be found at 9 *ILM* (1970), p. 1081.

[78] During UNCLOS Argentina supported the proposals for the attribution of an archipelagic regime to dependent midocean archipelagos; see UNCLOS III Off.Rec., Vol. II, 37th Meeting, para. 83, p. 272.

adoption of a fishing or territorial zone extending 200 n.m. from the coast of the states, it could be argued that article 2 referring to the right of the coastal states to 'delimit their maritime sovereignty and jurisdiction in conformity with their own geographic and geological characteristics and consonant with factors that condition the existence of marine resources and the need for national exploitation' recognises a special regime for the measurement of the maritime zones in cases where the geographical characteristics of the area require it, an example of which could be the case of the Galapagos Islands. It is true that there is no reference in the Montevideo Declaration to the Galapagos Islands, but this agreement in combination with the absence of any protest on behalf of these states could be considered as manifesting these states' acquiescence in the straight baselines system applied by Ecuador as provided for in the Ecuadorian national laws and the 1952 Santiago Declaration.

Similarly, in the 1975 Agreement between Colombia and Ecuador relating to the Maritime Boundary, the two states mutually recognised the right of each state to determine its baselines from which the width of the territorial sea should be measured 'by following straight baselines joining the outermost points of their coasts'.[79] Since Ecuador had already established the system of straight baselines around the Galapagos Islands, it may be assumed that Colombia has recognised this system.[80]

With regard to the reaction of the rest of the states of the international community vis-à-vis the baseline system applied to the Galapagos Islands, there are three states which have officially protested against the Ecuadorian claim in the Galapagos. The United Kingdom protested in 1951 against the claim made by Ecuador on the basis that this practice was contrary to international law, which provided for a belt of territorial sea for each island.[81] The Federal Republic of Germany also protested against this claim in November 1986.[82] However, these states protested only once and what is more, - to use the phrase of the ICJ in the Fisheries case - they 'did not pursue the matter' any further.[83] Moreover, as seen above, the UK

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[79] The text of the Agreement between the Government of Colombia and the Government of Ecuador relating to the maritime boundary may be found at J.I.Charney, L.M.Alexander, *International Maritime Boundaries* (Dordrecht, Martinus Nijhoff Publ., 1993), Report Number 3-7, p. 815-7.
[80] However, the straight baselines established by both countries have not affected the delimitation line: see J.I.Charney, L.M.Alexander, *ibid*, p. 812.
[81] Note of protest dated 14 September 1951 found at Pleadings of the 1951 *Fisheries case, ICJ Reports 1951*, Pleadings, Vol. IV, p. 589-590.
[82] J.A.Roach & R.W.Smith (1996), p. 115.
[83] In the *Fisheries case* the ICJ referred to the protest of France against the Norwegian decree of 1869 but found that France 'did not pursue the matter' and thus concluded that the Norwegian system

has also applied a similar system consisting of straight baselines around two of its archipelagic dependencies and therefore, it could be said that it has abandoned its opposition to the Ecuadorian practice. The belated protest filed by Germany cannot be deemed to reverse the inference of acquiescence as the rights of Ecuador with regard to the delimitation of the archipelago had already been established when the German Government protested.[84]

The USA filed a diplomatic protest in two instances in 1951 and 1986. In the first note sent to the Ecuadorian Ministry of Foreign Affairs on 7 June the American government raised its concern regarding the consideration of the Colon Archipelago as 'a continuous land mass for territorial waters purposes' stressing that this action was incompatible with international law according to which the territorial sea is measured from the coast of each island.[85] Later, after the promulgation of the 1971 Ecuadorian Decree, the United States protested again against the straight baselines drawn around the Galapagos archipelago on the basis of its incompatibility with the provisions of the LOSC regarding archipelagic states as defined in article 46 of the Convention.[86] However, the US has not tried to actively oppose the straight baseline system applied to the Galapagos. For example, despite the fact that in the fifties and sixties a dispute arose between the US government and Ecuador referring to the Ecuadorian claim to a fishing zone of 200 n.m. from the baselines,[87] the dispute concerned fisheries off the mainland coast of Ecuador and the US did not contest

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'encountered no opposition on the part of other states': *Fisheries case*, p. 136-7. See also the Norwegian arguments: *Fisheries case, Pleadings*, Vol. IV, p. 234, Vol. III, p. 481-4 respectively. See also Y.Z.Blum (1965), p. 16-7 (referring to this case).

[84] The UN Secretariat in its study on historic waters suggested that the opposition must be expressly formulated before the historic title came into being and pointed out that a State cannot 'reverse the process by coming forward with a protest against the accomplished fact'; *Study prepared by the Secretariat on Historic Waters*, p. 18

[85] M.M.Whiteman (1974), p. 800-801.

[86] Particularly, the United States government declared that "with regard to the straight baselines drawn around the Galapagos Islands, such straight baselines, which purportedly represent archipelagic baselines as contained in article 47 of the 1982 Law of the Sea Convention, may only be employed by an archipelagic state, defined in article 46 of the 1982 Law of the Sea Convention as 'a state constituted wholly by one or more archipelagos and may include other islands'. As Ecuador is a continental state and the Galapagos Islands constitute part thereof, the United States does not recognise as valid the straight baseline system around the Galapagos Islands for the purpose of delineating internal waters, territorial sea, economic zone or continental shelf"; American Embassy Quito Note delivered on 24 February 1986, State Department telegram 033256, 3 February 1986, American Embassy Quito telegram 01651, 25 February 1986 as quoted in J.A.Roach & R.W.Smith (1996), p. 115.

[87] This dispute led to the detention of and infliction of fines upon many American fishing boats and the continuing protests of the American State Department against the practice of Ecuador. See Ecuador-US Fisheries Dispute: Statement of the Secretary of State reproduced from Department of State Press Release No. 303 (June 5, 1963) found at 2 *ILM* (1963), p. 812. See also D.C.Lecuona, 'The Ecuador Fisheries Dispute (A new approach to an old problem), 2 *Journal of Maritime Law and Commerce* (1970-1), start. p. 91 particularly p. 107-111

Ecuador's sovereignty in the waters enclosed by straight baselines or its jurisdiction in the waters generated around the archipelago. Moreover, despite the fact that the USA has challenged Ecuador's claim of 200 n.m. territorial sea on many occasions within the framework of the Freedom of Navigation Program performed by the Department of Defense, it has not operationally asserted its protest against the baseline system applied in the Galapagos.[88]

Arguably, the US by virtue of its protests may be deemed to satisfy the criteria to qualify as a persistent objector to the validly established system in the Galapagos.[89] It may, however, be inferred from its reluctance to operationally challenge this system that it has implicitly recognised the validity of this system in international law presumably, as it will be argued below, as a case requiring special treatment because of the exceptional ecosystem of the archipelago.

The majority of the states of the international community have neither protested against the practice of Ecuador nor have they explicitly accepted it.[90]

There are, however, two particularities with regard to the case of the Galapagos. Firstly, as pointed out by O'Connell in his study on the legal status of archipelagos, the remoteness of the group as well as the non-interference with any of the shipping routes between Panama and New Zealand may explain the lack of attention given to this claim by other states.[91] It is true that the Galapagos Islands are in a considerable distance from the western coast of South America and, therefore, the generation of more extended maritime zones from the straight baselines around the archipelago has not created any problems with regard to delimitation of the maritime zones between the states in the region. What is more, the treatment of the archipelago as a whole and the consideration of the enclosed waters as internal do not impede any navigational route in the Pacific Ocean.

The second particularity of the area is the unique maritime ecosystem of the Galapagos Islands. The need to protect and preserve species within the national park and to facilitate scientific research for the benefit of mankind was emphatically

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[88] See Freedom of Navigation FY 2000-2003 Operational Assertions found at www.defenselink.mil/policy/sections/policy_offices/isp/fon_fy00-03.htm; see also Appendix H Freedom of navigation of the 2000 Annual Report of the Department of Defense to the President and Congress found at http://www.dod.gov/execsec/adr_intro.html.

[89] On the concept of the persistent objector see *infra*, p. 240, note 260-266.

[90] States which have applied a similar system such as Denmark, Portugal, Australia, Spain and China or states which supported the Ecuadorian proposals during UNLCOS III may be considered as having acquiesced in the system applied in the Galapagos.

[91] D.P.O'Connell (1971), p. 24.

stressed by the Ecuadorian delegate during UNCLOS III.[92] O'Connell seems to agree with this point and stresses that the claim raised by Ecuador with regard to the baseline system applied may be justifiable on the basis of the need to conserve the rare creatures that exist in the islands.[93]

The uniqueness of the archipelago has been recognised worldwide and attempts have been made to protect and preserve this exceptional marine ecosystem. Indeed, due to the vast number of endemic species the Galapagos Islands were declared a national park in 1959 and in 1986 the surrounding ocean was declared a marine reserve. The Marine Resources Reserve, as established in 1986 and expanded by the Special Regime Law for the Preservation and Sustainable Development of the Province of Galapagos in March 1996,[94] is composed of the waters enclosed by the baselines as applied by Ecuador as well as 40 n.m. around the whole archipelago measured from the established baselines. In 1978 UNESCO recognised the archipelago as a World Heritage Site and in December 2001 the recognition was extended to include also the Marine Reserve.[95] Moreover, the Galapagos Islands were designated in 2005 as a Particularly Sensitive Sea Area (PSSA) by the IMO.[96]

Ecuador has incorporated the straight baseline within the scheme for the protection of the vulnerable ecosystem by measuring the outer limit of the Marine Reserve from the already established baselines. The territorial sea of 200 n.m. as

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[92] See Chapter 1, p. 41, note 122.

[93] D.P.O'Connell (1971), p. 24. Fitzmaurice also accepted that state interests may be the reason or motive 'behind certain practices of states leading to the evolution of a customary rule of general international law' or 'for the building up by prescriptive means of a historic title or special right not normally accorded by law'' G.Fitzmaurice (1953), p. 69-70. He pointed out that vital interests and exceptional necessities despite the fact that they cannot constitute the legal basis for a departure from the existing rules, they may 'serve as evidence of a genuine need on the part of a State to depart from, or to be recognised as entitled to a special application of the normal rule and may form the basis on which other States can condone such departure or special application, thus leading to the building up of a prescriptive case' or the establishment of a new rule of customary law; G.Fitzmaurice (1957), p. 115-6. See also Blum for the role assumed by 'legitimate interests' in the formation of a historic title; Y.Z.Blum (1965), p. 177-188.

[94] The text of this law may be found at http://whc.unesco.org/pg.cfm?cid=31&id_site=1. This law contains the legal and administrative regulations in matters regarding the protection and preservation of natural resources and sustainable development. According to this law, responsibility for managing the Galapagos Maritime Reserve lies with the Galapagos National Park Service (GNPS) under a participatory management system involving various sectors of the society (fishing, tourism, research etc). The only activities permitted within the Reserve are local artisanal fishing, marine tourism and science education managed and regulated by the GNPS. See also a case study prepared for UNEP regarding the conservation and sustainability of the Galapagos Islands found at http://www.biodiv.org/programmes/socio-eco/incentives/case-study.aspx?id=5301.

[95] See the UNESCO's website at http://whc.unesco.org/pg.cfm?cid=31&id_site=1. In June 2007 the Galapagos were inscribed in the list of World Heritage in Danger by UNESCO (http://whc.unesco.org/en/news/357)

[96] See Chapter 3, p. 141, note 70.

claimed by Ecuador is also measured from the straight baselines around the archipelago.

The Marine Reserve was recognised by UNESCO as a World Heritage Site in 2001 and still no state protested or raised any objection. It is true that the recognition of the Marine Reserve cannot be interpreted as an acceptance of the straight baseline system *per se*; however, in so far as the case of the Galapagos was once more a case of international interest, where the issue of the straight baseline system was involved, and still no state or international body, eg. UNESCO, which examined the case of the Marine Reserve, raised any concerns regarding the application of such a system or regarding its compatibility with the international law of the sea,[97] it may be inferred that states have acquiesced in the application of this system.

On the basis of this acquiescence or – to use the phrase used by the ICJ in the Fisheries case – 'the general toleration of the international community'[98] and the passage of 70 years of continuing and consistent practice, it could be argued that Ecuador has acquired special customary or historic rights in the Galapagos archipelago consisting in measuring its maritime zones from baselines encircling the archipelago and considering the enclosed waters of the archipelago as internal.

A last point requiring clarification with regard to the rights of Ecuador in the archipelago concerns the exact content of these rights. Reisman and Westerman seem to accept that the consideration of the waters between the islands as internal might be acceptable in terms of historical reasons but they do not accept such an assertion with regard to the waters between the main islands and the island of Darwin in the northern section of the archipelago.[99]

The islands of Darwin and Wolf are indeed located at a considerable distance from the main group of islands; however, Ecuador has always treated them as part of the Galapagos archipelago and considered the waters between these islands and the

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[97] As regards the USA, there is indication that the American government has politically urged the enactment of the 1994 Special law on the Galapagos extending the Marine Reserve to 40 n.m. from the baselines around the archipelago. In a paper prepared for the UNEP regarding the Galapagos Islands the author points out that at the time before the promulgation of the Special Law for the Galapagos the American Vice-President under the pressure of activists groups 'phoned' the Ecuadorian President Alarçon' and 'urged him to pass the law'; Paper prepared by Julia Novy titled 'Incentive measures for the conservation of biodiversity and sustainability: A case study of the Galapagos Islands' found at http://www.biodiv.org/doc/case-studies/inc/cs-inc-ec-galapagos-en.pdf

[98] *Fisheries case,* p. 139.

[99] M.W.Reisman & G.S.Westerman (1992), p. 156.

main group as internal waters.[100] Moreover, in its publication examining the 1971 Ecuadorian Decree, the US Department of State acknowledged that the Darwin and Wolf islands have been historically considered to be part of the Galapagos archipelago.[101] Therefore, the rights acquired by Ecuador refer to the whole of the archipelago including the waters between the island of Darwin and the main islands.

4.4.4 Special customary law and general customary law: Does the former preclude the existence of the latter?

A last question to be answered is whether the acquisition of special customary rights in particular cases such as those discussed above might prevent the emergence of general customary law on the issue of dependent midocean archipelagos.

D'Amato asserts that 'special customary law deals with non-generalisable topics such as title to or rights in specific portions of world real estate (eg acquisitive prescription, boundary disputes, 'international servitudes') or with rules expressly limited to countries of a certain region (such as the Latin American law of asylum)'.[102] He seems to suggest that special customary rules cannot be generalised so as to acquire the status of general customary law.

However, the process of the transformation of a special rule to a general one depends upon the nature of the rule, that is whether it can be generalisable or not. Therefore, if the rule applies only to a special situation because of its exceptionality, this rule cannot be the content of a general custom. On the other hand, if the special custom may be applied in similar situations on the international plane, it may lead to the establishment of general customary rules.

Fitzmaurice, referring to this case as a paradox of international law, observes that 'it may be and often is precisely by action which in its inception, constitutes a departure from the normal rule, that a historic or prescriptive case is built up; and it is precisely through a large number of states starting to follow a practice that is at variance with the normal practice that a new customary rule of general international law may eventually come into existence'.[103] Similarly, Kontou stresses that 'special

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[100] See for example the preparatory document prepared by Evensen commenting on the 1951 Presidential Decree; J.Evensen (1958), p. 298. See also the 1971 Presidential Decree establishing the exact system of straight baselines including the islands of Darwin and Wolf in straight baselines system, Chapter 3, p. 140.

[101] *Limits in the Seas, No. 42: Straight Baselines: Ecuador*, p. 7.

[102] A.D'Amato (1971), p. 235.

[103] G.Fitzmaurice (1957), p. 113. Thirlway referring to the *Right of Passage case* pointed out that 'if the practice of unimpeded passage grows up wherever in the world there is an enclosed territory, any

customary rules may be created in the first stages of the development of new general custom, or if state practice supporting the new rule is not extensive enough.'[104]

As pointed out by D'Amato, in the case of a dispute before an international tribunal 'a lawyer may argue both kinds of custom on behalf of his client state, hoping that if he fails to persuade the Court on one ground he may succeed on the other'.[105] This has indeed occurred in cases before the ICJ where the claimants raised arguments based both on the existence of a general customary law and of a special customary law pertaining to the particular situation or valid in the specific state in question. For example, in the *South West Africa case*, the applicant states invoked in their pleadings the existence of prohibition of apartheid both as a generally applicable principle as well as a 'standard' applied to South West Africa.[106] Similarly, in the *Right of Passage case*, Portugal advanced arguments supporting both the existence of a general rule of customary international law according to which there was a right of military access in the case of enclaves and of a local customary rule applying to the specific situation.[107]

In the case of dependent midocean archipelagos, despite the fact that special customary rules stem from and are based upon the particularities of each case – as analysed above for the case of the Galapagos Islands or the Faroe Islands –, these rules have a common element, namely the application of a straight baseline system for the measurement of the maritime zones of groups of islands and therefore, they are generalisable.

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individual special customs, in existence or in *statu nascendi*, are presumably merged like droplets of mercury coming together, into the general custom'; H.W.A.Thirlway, (1990), p. 105-6.

[104] N.Kontou (1994), p. 5-6; see also Restatement of the Foreign Relations Law of the United States (Revised), Section 102 comment b, p. 25: 'Failure of a significant number of important states to adopt a practice can prevent a principle from becoming general customary law though it might become 'particular customary law' for the participating states'. Cohen-Jonathan, referring to the case of regional customary law, points out that 'une coutume locale peut d'abord constituer une coutume générale en voie d'élaboration'; G.Cohen-Jonathan (1961), p. 140.

[105] A.D'Amato (1971), p. 235.

[106] A.D'Amato (1971), p. 236. For reference to the oral arguments of the case see A.D'Amato, 'Legal and Political Strategies on the South West Africa Litigation', 4 *Law in Transition Quarterly* (1967), p. 26-29, 36-9. The ICJ rejected the application on the basis of a lack of legal interest on behalf of the applicants; see *South West Africa cases* (Ethiopia v. South Africa; Liberia v. South Africa, Second Phase, Judgment of 18th July 1966) *ICJ Reports* 1966, p. 4.

[107] *Right of Passage over Indian Territory*, p. 39-40, 43-44; A.D'Amato (1971), p. 257. In this case the Court made a distinction between special and general customary law and argued that 'since the practice between the two states was clearly established', 'such a particular practice must prevail over any general rules', *ibid.* Slouka generally contends that 'it is most often in the bilateral relations of states that disputes arise, and it is with reference to such relations that they can be most easily settled', Z.J.Slouka, *International Custom and the Continental Shelf: A Study in the Dynamics of Customary Rules of International Law* (The Hague: Martinus Nijohff Publishers, 1968), p. 8.

In the case of divergent practice, where there is ambivalence with regard to the rule in force, special customary law plays an important role in the relations among states. Slouka who emphasised the dynamic and evolutionary character of customary law[108] accepted the evolution of general customary law through the establishment of legal rules regulating state-to-state relations (bilateral approach).[109] Moreover, as Brownlie points out 'if the process (of the formation of customary law) is slow and neither the new rule nor the old have a majority of adherents then the consequence is a network of special relations based on opposability, acquiescence and historic title'.[110]

Therefore, if state practice has not acquired the necessary level of generality, each instance of straight baseline application in groups of islands may be validated on the basis of a rule of special customary law. This does not preclude, however, the consideration of each case as instances of general state practice leading to the emergence of a customary rule of general application. The examination of whether state practice has led to the emergence of a general rule of customary law regarding outlying archipelagos will be examined in the next subsection.

4.4 The status of general customary international law on the issue of dependent outlying archipelagos

4.4.1 Formation and ascertainment of general customary international law

By virtue of article 38 of the Statute of the International Court of Justice, international custom is defined as 'evidence of a general practice accepted as law'.[111]

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[108] He pointed out that the impression that 'until a certain figure (of state practice) is attained nothing of real legal relevance has happened, or only very little and that a new legal rule springs up only when the mysterious culmination point has been reached' denounces the true character of customary law which is dynamic and evolutionary, Z.J.Slouka (1968), p. 6

[109] Slouka clarifies the bilateral approach as following: 'a method of determining the existence, scope and intensity of customary rules comprising the legal regime of the continental shelf by analysing their legal development in terms of state-to-state relations' (p. 39). And he summarises his perception on customary law based on the bilateral approach as following: 'seen from the bilateral viewpoint ... every customary rule binding on more than two states appears to consist of a number of specific legal relationships even if it is, in rare cases, a truly universal one. And that viewpoint then also discloses both the stability and the dynamism of international custom' Z.J.Slouka (1968), p. 10. Slouka stressed the importance of the existence of special customs governing the particular relations among states due to the uncertainty created by the difficulty in ascertaining general customary law. See A.D'Amato for a criticism of Slouka's views regarding the relativity of international law; A.D'Amato (1971), p. 202-211, 258.

[110] I.Brownlie (2003), p. 12. Akehurst has also stated that in the case of divergence of practice and uncertainty with regard to the prevalent rules 'recognition of separate sub-systems of special custom provides a solution to problems which might otherwise be almost insoluble'; M.Akehurst (1974-5), p. 31.

[111] Wolfke refers to this article of the Statute of the ICJ as the 'natural starting point for every discussion on customary international law' acknowledging at the same time the confusion arising from

As implied by this definition and accepted by the ICJ, customary law is composed of two elements: the first - often referred to as the material element-[112] concerns the practice or usage (*usus*) of states and the second– the so-called psychological element – refers to the conviction or belief that this practice is necessary because the law requires it (*opinio juris sive necessitatis*). [113] These two elements, as Stern points out, are not in juxtaposition to each other but are in fact two aspects of the same phenomenon: *'une certaine action qui est subjectivement exécutée ou perçue d'une certaine façon'.*[114]

Article 38 of the Statute of the Court only vaguely indicates the conditions that should be fulfilled for the formation of customary law complicating the ascertainment of the existence of customary law.[115] The following subsection will examine whether the elements necessary to generate customary international law are present in the case of dependent outlying archipelagos. Particularly, the following analysis will attempt to answer the question whether the practice of continental states applying straight baselines to their outlying archipelagos has led to the emergence of a rule of customary international law.

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its wording, K.Wolfke (1993), p. 2, 5-8. Ferrari Bravo points out that most probably the intention of the authors of this article was not to give a definition of international custom but to indicate in a practical way how the judge would find out the content of the applicable to each case rules of customary law: L.Ferrari Bravo, 'Méthodes de recherche de la coutûme internationale dans la pratique des Etats', 192 *Hague Recueil* (1989-III), p. 243.

[112] Mendelson uses the term 'objective element' in order to avoid confusion with the concept of the 'material source of law': M.Mendelson (1998), p. 197.

[113] The existence of the constituent elements of customary international law is recognised by the ICJ as reflected in its oft-quoted dictum in the *North Sea Continental Shelf case*: 'Not only must the acts concerned amount to a settled practice but they must also be such or be carried out in such a way as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, i.e. the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.' *North Sea Continental Sea cases*, p. 41, para. 71; see also in the *Libya/Malta case* the ICJ stated that the substance of customary law must be 'looked for primarily in the actual practice and *opinio juris* of states'; *Case concerning the Continental Shelf* (Libyan Arab Jamahiriya/Malta) Judgment of 3 June 1985) *ICJ Reports*, 1985, p. 29, para. 27; see also the advisory opinion of 8 July 1996 on the *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Reports* 1996, p. 253-4. The Court indeed stressed the significance of the existence of both elements of custom by pointing out that 'the Court must satisfy itself that the existence of the rule in the *opinio juris* of states is confirmed by practice'; *Nicaragua case,* para. 184.

[114] B.Stern, 'La Coutume au Coeur du Droit International', *Mélanges offerts à Paul Reuter: Le Droit International: Unité et Diversité* (Paris, Editions A.Pedone, 1981), p. 482 ; see also R.Mullerson, 'The interplay of objective and subjective elements in customary law' in K.Wellens (ed.) *International Law: Theory and Practice, Essays in Honour of Eric Suy* (The Hague, Martinus Nijhoff, 1998), p. 165-6.

[115] K.Wolfke (1993), p. 52; M.Akehurst (1974-5), p. 1; H.Lauterpacht, *The Development of International Law by the International Court of Justice* (New York: Praeger, 1958), p. 390.

A. State Practice – The material element

State practice as the material element of customary law can be understood as the totality of actions and behaviours of a state, which may have a juridical meaning.[116] Two are the controversial issues with regard to state practice forming the material element of customary law: the first refers to its formulation and its nature, that is, which and what kind of state practice should be taken into consideration when examining the formation of customary law. The second one refers to the characteristics of this state practice and particularly its 'quality' and its 'quantity'.

The practice of continental states in applying straight baselines systems to their outlying archipelagos was presented and analysed in Chapter 3. It was therein found that this practice reflects the archipelagic concept in the sense that straight baselines have been applied encircling the archipelago and that the enclosed waters have been regarded as internal waters of the state. In the following section, this practice will be critically assessed with a view to demonstrating whether it may qualify as leading to the formation of customary rules according to which a special system for the measurement of the maritime zones may be applied to dependent outlying archipelagos. As contributing to the formation of rules of customary law regarding archipelagos, the practice of 'failed' archipelagic states will also be examined; despite the fact that these states do not qualify for the application of the archipelagic regime of Part IV of the LOSC, they have applied straight baselines around their archipelagos in a way so as to reflect the archipelagic concept.

(i) Assessment of the practice of continental states presented in Chapter 3

The first issue with regard to the form of state practice raises the question of whose acts should be taken into consideration, namely the practice of which organs of the state could lead to the formation of customary law.

As analysed in Chapter 3, Denmark, Ecuador, Norway, Spain, Portugal, Australia, UK, France, China, Eritrea, Sudan, Saudi Arabia and the United Arab Emirates have enacted legislation in the form of declarations, orders, decrees and acts

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[116] Ferrari Bravo refers to state practice as 'tout comportement d'un Etat qui soit révélateur d'une attitude consciente de celui-ci vis-à-vis d'une règle de droit international ou d'une situation juridique internationale', p. 261; see also M.Virally, 'Panorama du droit international contemporain : Cours Général de Droit International Public', 183 *Hague Recueil* (1983-V), p. 180-1. For a list of the material sources of custom see I.Brownlie (2003), p. 6; M.Shaw (2003), p. 77-79; M.Mendelson (1998), p. 204-209.

proclaiming straight baseline systems around their outlying archipelagos considering the enclosed waters as internal and measuring the maritime zones from these baselines. Iran has enacted similar legislation internalising the waters between the islands without though the use of straight baselines. All these instances of state practice have an international effect on the relations of these states vis-à-vis third states and therefore do qualify as the kind of state practice which could lead to the formation of customary law. [117]

A question which should also be answered is whether national law validly promulgating a straight baseline system for the measurement of the territorial sea which has not been applied in practice, qualifies as state practice leading to the formation of customary law. This would concern the case of Sudan, Saudi Arabia and the United Arab Emirates; the rest of the states engaged in this practice have enforced their national laws by drawing the straight baselines on maps and by using the specific baselines for the measurement of their territorial sea.

With regard to the practice of Sudan and Saudi Arabia, their legislation for the measurement of the territorial sea prescribes that the territorial sea of a group of islands located at a distance exceeding 12 n.m. from the coast, will be measured from straight baselines joining the 'outer shore' of the islands of the group.[118] The United Arab Emirates have also proclaimed a system of straight baselines joining the outer points of the islands forming the group without stipulating any distance requirement.[119] However, these states have not actually enacted any legislation specifying the exact geodetics for the drawing of the straight baselines around the archipelago nor have they published any charts encompassing such delimitation.[120] In the case of the United Arab Emirates it should be noted, however, that in the absence of designated straight baselines, the waters between islands lying at a distance not

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[117] National laws establishing the maritime zones and particularly the baselines for the measurement of these zones have been accepted as instances of state practice leading to the establishment of customary law. See Danilenko referring to the case of the continental shelf and the EEZ: G.Danilenko (1988), p. 22; see also Ferrari Bravo who characteristically states that 'un acte de législation dans un domaine relevant du droit international représente le degré le plus élevé de la pratique de l'Etat dont le émane', p. 280; See also Barbaris, 'Réflexions sur la coutume internationale', *AFDI* (1990), p. 32.

[118] See Chapter 3, p. 162.

[119] See Chapter 3, p. 164.

[120] J.R.V.Prescott, *The Maritime Political Boundaries of the World (*1985), p. 167. The US government protested against the failure of the Sudanese government to publish the maps in which the promulgated straight baselines; see Diplomatic Note from American Embassy in Khartoum delivered 6th June 1989. State Department telegram 174664, 2 June 1989; American Embassy Khartoum telegram 06535, 7 June 1989, as quoted in J.A.Roach & R.W.Smith (1996), p. 117.

exceeding 12 n.m. have the status of internal waters according to the 1993 Federal Law.[121]

It seems therefore that these states have raised a claim in international law but have not tried to enforce it in practice. This question is connected with the controversial issue addressed by authors of whether mere claims or verbal declarations may be considered as state practice leading to the formation of customary law. There are authors suggesting that verbal declaration not followed by positive assertion cannot lead to the formation of customary international law,[122] whereas other authors accept that claims raised by states regardless of their actual enforcement can be taken into account for assessing whether a rule of customary international law has been established.[123]

The position of the ICJ is not clear in this matter; it is true that in many cases the Court has examined not only the practice of the states concerned but also their views expressed with regard to the particular issue;[124] for example, in the *Asylum case* the Court referred to the actual practice of states granting asylum but also to the 'official views expressed on different occasions'[125] It is not, however, clear whether

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[121] See Chapter 3, p. 164.

[122] A.D'Amato (1971), p. 88; K.Wolfke (1993), p. 42; K.Wolfke, 'Some persistent controversies regarding customary international law', 24 *NYIL* (1993), p. 3.

[123] See Akehurst who refers to the successive UN Conferences on the Law of the Sea and the following cases of the ICJ: *Fisheries Jurisdiction case, North Sea Continental Shelf case, the Asylum case, the Rights of US Nationals in Morocco case*. He also points out that 'it may be that a claim supported by physical acts carries greater weight than a claim not supported by physical acts, but that is not the same as saying that the latter claim carries no weight at all', footnote I, same page, M.Akehurst (1974-5), p. 2; see also M.Mendelson (1998), p. 205-7. M.E.Villiger (1985), p. 5-10. Zemanek raises an interesting point regarding the change in the nature of custom: 'Today states engage only exceptionally in gunboat diplomacy or in equivalent 'real acts' but attack each other verbally over the media or in international fora. Thus the 'verbal' act has largely replaced the 'real' act of former times': K.Zemanek, 'The legal foundations of the international system: General Course on Public International Law', 266 *Hague Recueil* (1997), p. 166. M.Byers, *Custom, Power and the Power of Rules: International Relations and Customary International Law* (Cambridge: Cambridge University Press, 1999), p. 134-5; see also the Restatement of the Foreign Relations Law of the United States (Revised), Section 102 comment b, p. 25, as adopted and promulgated by the American Law Institute, Washington, May 14, 1986, Vol. I, (St Paul, Minn: American Law Institute Publications, 1987): 'practice of states includes diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy'.

[124] See the discussion of various judgments of the ICJ with regard to the issue of the nature of state practice in H.Thirlway (1990), p. 54-75; see particularly the comments on *Nicaragua case*, p. 70-73.

[125] *Asylum case*, p. 277. In the *Rights of US Nationals in Morocco* the ICJ examined diplomatic correspondence and conference records in order to infer the existence of custom; *Rights of the Nationals of the USA in Morocco* (France v. USA, Judgment of 27th August 1952), *ICJ Reports 1952*, p. 200 and 209 respectively.

the Court in this way was examining the state practice of the states or their *opinio juris*.[126]

The claims raised by Sudan, Saudi Arabia and United Arab Emirates in their legislation are made *in concreto* and are intended at expressing the position of these states with regard to the delimitation of the territorial sea of island groups.[127] In the particular case of Sudan, it should also be noted that the USA protested against the provisions of this decree concerning the measurement of the territorial sea of archipelagos.[128] Accepting that mere declarations may compose state practice leading to the establishment of customary law – which is the view expressed by most authors nowadays -,[129] the national legislation of these states can be taken into account for the consideration of the status of customary international law. Despite the fact that this legislation is 'declaratory' and does not represent 'actual' practice, these states may, at any time, enact decrees and designate straight baselines around groups of islands.[130]

It is difficult to evaluate the national legislation regarding two archipelagos the sovereignty of which is disputed. China has promulgated a straight baseline system around the Paracel Islands and has specified the exact geodetics for the drawing of these baselines. The sovereignty of the archipelago is disputed by Vietnam and Taiwan[131] but China has actual possession of all the islands and other geographical features of the archipelago. It might be said that due to the sovereignty dispute in the

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[126] This may be an indication of how closely interrelated the elements of customary international law are in practice. See H.Thirlway (1972), p. 58 who contends that mere assertions in *abstracto* 'can be relied on as supplementary evidence both of state practice and of the existence of the *opinio juris*; but only as supplementary evidence and not as one element to be included in the summing up of state practice for the purpose of assessing its generality'.

[127] See H.Thirlway (1972), p. 58: despite the fact that he suggests that practice should be material or concrete 'intended to have an immediate effect on the legal relationships of the State concerned', he accepts that a claim raised by a state in a specific context and not *in abstracto* could result in the establishment of a customary rule; see also G.Danilenko: 'the recognition of verbal forms of practice does not suggest the denial of the specifics of custom. As a source of law, custom continues, as before, to be based primarily on real and concrete legal relations. For this reason, the significance of relevant declarations on the development of customary law depends on the specific situation and should be evaluated each time against the background of actual practice'; G.Danilenko (1988), p. 24. Akehurst also observes that 'a law which is frequently applied carries greater weight than a law which is never or seldom applied' acknowledging, thus, that this particular law does carry weight as state practice forming customary law: M.Akehurst (1974-5), p. 9.

[128] Diplomatic Note from American Embassy Khartoum delivered 6th June 1989. State Department telegram 174664, 2 June 1989; American Embassy Khartoum telegram 06535, 7 June 1989. as quoted in J.A.Roach and R.W.Smith (1996), p. 117.

[129] *Supra* note 123.

[130] The issue of whether these states may be thought to have abandoned their claims because of the non-designation of the straight baselines is discussed *infra*, p. 216-217.

[131] Vietnam and the Philippines have protested against the Chinese law promulgating straight baseline around the Paracel Islands mostly on the basis of the disputed sovereignty of the islands; see *infra* p. 24-241.

South China Sea,[132] China has been reluctant to enforce its jurisdiction in the enclosed waters.[133] Nevertheless, China has designated the straight baselines and has published maps showing their exact location and therefore the Chinese declaration may qualify as state practice for the purpose of generating customary law.

The consideration of the case of the Falkland Islands is easier. The sovereignty of the islands is indeed disputed between the UK and Argentina, but the UK, which has the actual administration of the islands, has enacted and enforced its legislation regarding the application of a straight baseline system around the islands by drawing and using these baselines for the measurement of the maritime zones of the archipelagos.[134] Argentina has also enacted similar legislation for the application of a straight baseline system but has not actually enforced it, as she does not exercise administrative control on the islands.[135] Despite the sovereignty dispute in these archipelagos, the application of a straight baseline system can be considered as state practice leading to the formation of customary international law.

(ii) Assessment of the practice of 'failed' archipelagic states

Apart from the fore-mentioned state practice, there are certain archipelagic states not qualifying for the application of the archipelagic regime because of the minimum limit in the water-to-land ratio (that is, 1:1 according to article 47 (1) of the LOSC), which have applied straight baselines around their archipelago or parts of it.[136] The main idea advanced in the present thesis is based on the argument that archipelagos should be attributed a special regime on the basis of their geographic particularities and not on the basis of their political status, and thus, in this sense the practice of archipelagic states which do not qualify for the archipelagic regime is equally important for the formation of a customary rule on the issue of archipelagos.

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[132] The sovereignty dispute over the Paracel (claims raised by China, Taiwan and Vietnam) and the Spratlys (claims raised by China, Vietnam, Malaysia, Brunei, the Philippines and Taiwan) have triggered three military incidents between China and Vietnam and China and the Philippines in 1974, 1988 and 1995. With regard to the Spratly archipelago, no special baseline system has been applied for the Spratlys as the territory is fragmented among the claimant states.

[133] Despite the tension in the area of the South China Sea, no incidents have been reported concerning the attempts by China to enforce its sovereignty over the enclosed waters.

[134] For the relevant legislation see Chapter 3, p. 133-136.

[135] See Chapter 3, p. 135.

[136] The requirement stipulated by article 47 that the water-to-land ratio should be at a minimum of 1:1 was intended to exclude archipelagos dominated by one large insular component. It has been argued that these archipelagos have been excluded because they may apply a straight baseline system as provided for in article 7 of the LOSC; H.W.Jayawardene (1991), p.146; R.D.Hodgson & R.S.Smith (1976), p. 243; M.Munavvar (1995), p. 6.

Malta (Figure No. 1 in Appendix) has applied a straight baseline system joining the outermost points of the islands comprising the archipelago (Malta, Gozo, Comino and Cominotto, Filfla).[137] Despite the fact that Malta is an archipelagic state according to article 46 of the LOSC, she cannot apply the archipelagic regime, as the water-to-land ratio created after the drawing of the baselines is less than the minimum required of 1:1 (specifically it is 0.64:1).[138] The straight baselines applied by Malta do reflect though the archipelagic concept.

Cuba has also applied a similar system of straight baselines joining the whole archipelago (Figure No. 2 in Appendix).[139] It is difficult to classify Cuba either as a mainland-type island with coastal archipelagos fringing its coasts or as an outlying archipelago. Indeed, the archipelago is dominated by a large island with many islands around its coasts. However, seen in its entirety the archipelago does compose an archipelagic state according to the legal definition embodied in article 46 of the LOSC. It cannot apply archipelagic baselines though because the conditions regarding the minimum water-to-land ratio are not met. In some parts of the archipelago the application of straight baselines has been deemed as valid on the basis of article 7 of the LOSC, as the coast is deeply indented and cut into but there are other points where straight baselines have been drawn inconsistently with article 7.[140] The fact that Cuba has encircled the archipelago in a uniform straight baselines system does reflect the archipelagic concept.

Having concluded that the practice both of continental states and 'failed' archipelagic states in applying straight baselines around their outlying archipelagos in a way so as to reflect the archipelagic concept, qualifies as state practice leading to the

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[137] Article 3 (1) of the Territorial Waters and Contiguous Zone Act No XXXII of 1971 as amended by Acts XLVI of 1975, XXVIII of 1981 and I of 2002.

[138] B.Kwiatkowska, *Decisions of the World Court Relevant to the UN Convention on the Law of the sea: A reference guide* (The Hague: Kluwer Law Int., 2002), p. 37.

[139] Act of 24 February 1977 concerning the breadth of the Territorial Sea of the Republic of Cuba; the act may be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/CUB.htm . *US State Department, Limits in the Seas, No. 76, Straight baselines: Cuba* (October 1977), p. 6. In a reply to the US protest Cuba made clear that she does not claim archipelagic status but that her straight baselines 'reflect the most advanced thinking of that time and incorporate the criteria used by the Cuban people as far back as 1934 in Decree Law No. 8 in which they claimed their internal waters'; Ministry of Foreign Relations, Havana, Note dated 26 June 1984 as quoted in J.A.Roach and R.W.Smith (1996), p. 106-108.

[140] See J.R.V.Prescott, *The Maritime Political Boundaries of the World* (1985), p. 337 for an analysis of the straight baseline and its incompatibility with the requirements of article 7 of the LOSC; see also W.M.Reisman & G.S.Westerman (1992), p. 122; see also Limits in the Seas No. 76 (1977), p. 7-8. The US has protested against the Cuban Decree; Department of State Note dated 5 July 1983 to the Cuban Interests Section Embassy of Czechoslovaki as quoted in J.A.Roach & R.W.Smith (1996), p. 104-106.

formation of customary law, it should be examined whether this practice satisfies the particular 'qualifications' for the establishment of customary law.

(iii) Elements of state practice essential for the formation of customary law

(a) Duration

With regard to the element of time as an element of state practice, it is argued that no particular duration is required for the formation of customary law[141] and that the time needed for the customary law to emerge will depend upon the specific circumstances of the case.[142] However, time is still relevant for the formation of customary law particularly as the passage of time will be evidence of the generality and consistency of state practice[143] and will strengthen the inference of acceptance of the practice by the other states of the international community.[144] The ICJ in the *North Sea Continental Shelf case* pointed out that 'the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law ...'.[145] In the *Fisheries Jurisdiction cases* the ICJ accepted a period of 12 years as sufficient for the formation of a rule of customary law.[146]

The duration of the practice of continental states in applying straight baselines to their outlying archipelagos varies. The practice of Denmark and Ecuador traces back to 1903 and 1934 respectively, when these states initially enacted legislation for the protection of its natural resources considering the archipelago as a unit for the measurement of the territorial sea.[147] Other states have followed this policy later on

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[141] R.R.Baxter, 'Treaties and Custom, 129 *Hague Recueil* (1970-I), p. 67; J.L.Kunz, 'The nature of Customary Law', 47 *AJIL* (1953), p. 666.

[142] M.N.Shaw (2003), p. 72; A.Cassese (2001), p. 158. M.Bos, 'The identification of custom in International Law', 25 *GYIL* (1982), p. 28.

[143] Brownlie argues that 'the passage of time will be a part of the evidence of generality and consistency';.I.Brownlie (2003), p. 7. Bernhardt also links the factor of time with other factors leading to the formation of customary law: 'the shorter the practice the more important is its uniformity and its acceptance by the international community as binding law'; R.D.Bernhardt, 'Custom' in R.Bernhardt et al. (ed.), *Encyclopedia of Public International Law*, Vol. 7 (Amsterdam: North-Holland, 1984), p. 64.

[144] See *infra* on the notion of acquiescence, p. 242 *et seq.*.

[145] *North Sea Continental Shelf cases*, p. 43, para. 74. See also pp. 177 (Judge Tanaka) and p. 230 (Judge Lachs)

[146] *Fisheries Jurisdiction case*, p. 23, para. 52. The time taken into consideration by the Court referred to the period between the 1960 Geneva Conference on the Law of the Sea and the filing of the British application in 1972.

[147] These decrees did not provide for the application of straight baselines; the decrees provided for such systems were enacted in 1971 (for the Galapagos) and in 1967 (for the Faroe Islands – the straight baseline was specified by means of geodetics in 1976).

and at various times.[148] In most cases (Ecuador, Denmark, Norway, Australia, Portugal, Spain, France (for the Kerguelen Islands), UK, Malta, Cuba) the system has been applied for as long as 20 years which can be considered – in combination with the consistency of the practice of these states - as a sufficiently long period of time.

Another issue that should be discussed concerns whether the time of establishment of the baseline systems in relevance to the adoption or entry into force of the Law of the Sea Convention should be taken into account for the evaluation of the duration of the practice. Has the adoption of the Convention 'stopped' the evolution of customary law and thus any practice before the Convention is disqualified in terms of estimating its duration?

Some of the states enacted their legislation applying straight baseline systems to their outlying archipelagos before the adoption of the LOSC by UNCLOS III;[149] some other states did so after the adoption of the LOSC but before its coming into force or before their ratifying this Convention;[150] and lastly some states have enacted their legislation after the entry into force of the LOSC.[151] It is argued that this may have some relevance to the element of *opinio juris* which is discussed below,[152] but it is not pertinent to the assessment of the time element. The application of straight baselines in outlying archipelagos is a continuous act in the sense that states have been applying this system in their practice from the time of its establishment regardless of the parallel existence of conventional law. The process of customary law is not impeded by the adoption of a treaty on the same subject matter; the contrary would happen only in the case in which states, following their ratification of the LOSC, changed their practice. This is not the case with the state practice discussed here. States have enacted their legislation and have been applying such methods for the measurement of

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[148] Denmark (Sjaelland, Laesø, 1966, 1999), Norway (Svalbard, 1970, 2001), Australia (Furneaux Group, Houtman Abrolhos Islands, 1983), Portugal (Azores & Madeira Islands, 1985), Spain (Balearic Islands, Canary Islands, 1977), UK (Falkland Islands, South Georgia, Turks and Caicos, 1989), France (Guadeloupe, Saint Barthelemy, 1999 / Kerguelen Islands, 1978 / Loyalty Islands, 2002), China (Xisha Islands, 1958 (not clear), 1996), Sudan (Suakin Archipelago, 1970), Suadi Arabia (1958), United Arab Emirates (1993), Iran (1993); in the category of 'failed' archipelagic states Malta enacted her legislation in 1971, Cuba in 1977 and Japan in 1996.

[149] See Faroe Islands (1967), Galapagos (1971), Kerguelen Islands (1978), Balearic and Canary Islands (1977), Sjaelland & Laesø (1966, they reiterated the same baseline system in a decree enacted in 1999), Suakin Archipelago, 1970, Saudi Arabia (1958), Sudan (1970)

[150] See Furneaux Group & Houtman Abrolhos Islands (1983), Azores & Madeira Islands (1985), Falkland Islands, Turks and Caicos (1989), United Arab Emirates (1993).

[151] See Guadeloupe, Saint Barthelemy (1999), Loyalty Islands (2002), Svalbard (2001).

[152] See *infra* p. 222 *et seq*...

the territorial sea of archipelagos continuously regardless of the adoption, ratification or entry into force of the LOSC.

(b) Consistency and uniformity

The ICJ has rejected the existence of custom in cases where state practice is divergent and contradictory.[153] Particularly, in the *Asylum case* the World Court pronounced that for a custom to be considered as binding it should be proved that the 'rule invoked ... is in accordance with a *constant* and *uniform* usage (emphasis added) practiced by the states in question'.[154] Therefore, it is necessary that the states engaged in a specific practice show consistency and uniformity.

Mendelson elucidates the notion of consistency and uniformity by stressing that state practice should be consistent both 'internally and collectively'.[155] The internal consistency and uniformity refer to the agreement or similarity ('concordance') of the successive actions of each state engaged in the particular practice.[156] The collective consistency, on the other hand, necessitates that the particular practice is uniform among the states engaged in this practice. Therefore, all the states involved should behave in a similar way with regard to the particular issue and should 'circumscribe, apply or refer to, and thereby express the same customary rule'.[157]

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[153] In the *Asylum case* the Court after examining the practice of the Latin American states with regard to the policy followed concerning political asylum concluded that 'the facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on different occasions; there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some states and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law...'. *Asylum case*, p. 277. However, Shaw stressed that in the first case the ICJ dealt with an issue of regional law and that 'the same approach need not necessarily be followed where a general custom is alleged and that in the latter instance a lower standard of proof would be upheld', M.N.Shaw (2003), p. 73. Similarly, the ICJ assessed the uniformity element in the *Fisheries case* where it upheld that the rule of 10 n.m. for the closing line of bays was not part of customary law due to divergent state practice. *Fisheries case*, p. 131. See also *US Nationals in Morocco case*, p. 200 (concerns the internal consistency); *North Sea Continental Shelf cases*, p. 43.

[154] *Asylum case*, p. 276-7; see also *Right of Passage case*, p. 40 and *US Nationals in Morocco case*, p. 200.

[155] M.Mendelson (1998), p. 212.

[156] N.Q.Dinh, P.Daillier, A.Pellet (1980), p. 300-1. M.N.Shaw (2003), p. 72. However, as Akehurst observes, the uniformity in the practice of the states involved should not be absolute and 'a small amount of inconsistency does not prevent the establishment of customary rules', M.Akehurst (1974-5), p. 20. The ICJ in the *Fisheries case* considered that 'too much importance need not be attached to the few uncertainties or contradictions, real or apparent, which the UK government claims to have discovered in Norwegian practice. They may be easily understood in the light of the variety of the facts and conditions prevailing in the long period which has elapsed since 1812 and are not such to modify the conclusions reached by the Court', *Fisheries case*, p. 138.

[157] M.E.Villiger (1985), p. 22.

In the case of outlying archipelagos, all the states mentioned above have applied straight baseline systems around their archipelagos and have been using these systems continuously since their establishment.[158]

However, despite the fact that the above practice of states seems 'internally' consistent, there are some inconsistencies in the actual policy of some of these states in the treatment of their archipelagos. Some of them have applied a system of straight baselines for some of their archipelagic territories while they have refrained to do so for others. For example, the UK has applied a system of straight baselines for the Falkland Islands and the Turks and Caicos[159] while at the same time it is using the low-water mark for the delimitation of the territorial sea of the Bermudas and the Virgin Islands. France has also applied selectively a system of straight baselines for the delimitation of the territorial sea for some of its archipelagic territories such as Guadeloupe, Loyalty Islands and the Kerguelen Islands[160] whereas French Polynesia has no special regime with regard to the delimitation of the maritime zones. Finally, Australia has applied a straight baselines system around the Furneax Group and the Houtman Abrolhos Islands[161] but she has not applied any such system for the delimitation of the territorial sea of the Keeling (Cocos) Islands. However, this inconsistency may be explained on the basis of the perception of these states with regard to the limits of the rule regulating the application of straight baselines. This is connected with the geographical realities of groups of islands and particularly with the fact that the groups where states have applied such a system are closely-knit with islands located at a close distance to each other covering a relatively small maritime space. The relevance of this perception to the limits of the emerging customary rule is addressed in a following subsection.[162]

Lastly, the failure of Sudan, Saudi Arabia and United Arab Emirates to enforce their laws by drawing exact baselines on the map might indicate that these states have abandoned their previous claims or that their practice is inconsistent. In the particular case of Sudan, however, it should be noted that this country was embroiled in two prolonged civil wars during most of the time since its independence from the UK in

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[158] From the instances of state practice presented above, solely Iran has applied a different system internalising the waters between the islands of a group without, however, using a system of straight baselines.
[159] See Chapter 3, p. 133-136 (Falkland Islands), 155-157 (Turks and Caicos).
[160] See Chapter 3, p. 123-125 (Kerguelen Islands), 136-138 (Guadeloupe), 157-159 (Loyalty Islands).
[161] See Chapter 3, p. 131-133 (Furneaux Group), 146-147 (Houtman and Abrolhos).
[162] See *infra* p. 250 *et seq*..

1956. Therefore, the non-application of the particular law might not really signify an abandonment of the claim by this state but a practical impotence in its enforcement due to political instability. It should also be observed that these states have not repealed or modified these acts nor have they enacted any other baseline system for the measurement of their territorial sea. It is open to them to enact legislation designating the exact geodetics for the drawing of straight baselines whenever they consider as appropriate.

On the other hand, the practice of these states seems 'collectively' uniform. All these states have used a system of straight baselines encircling their archipelagos or parts of it considering the enclosed waters as internal. The element of uniformity of practice among the states of the international community relates to the element of generality and will be examined in the next paragraph.

(c) Generality

Generality of practice refers to the extent of the particular behaviour among the members of the international community.[163] Though it is accepted that universality is not required,[164] the question of how many states should follow this practice for a rule of customary law to emerge is difficult to answer. The ICJ in the *North Sea Continental Shelf case* stated that 'a very large and representative participation' suffices especially if the practice includes 'that of states whose interests are specially affected'.[165] The proper representation of states will depend on the particular circumstances and especially on the issue at state.[166]

Moreover, the percentage of states required should be assessed not with regard to all the states of the international community but with regard to the states eligible to engage in the particular practice. In the *North Sea Continental Shelf case* the ICJ

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[163] Mendelson refers to this qualification of state practice as 'its scope *ratione personae*'; M.Mendelson (1998), p. 214.

[164] I.Brownlie (2003), p. 7; N.Q.Dinh, P.Dailler, A.Pellet, p. 302 (They point out that unanimity is a unrealisable hypothesis). D.P.O'Connell (1970), p. 15; J.Combacau & S.Sur, *Droit International Public* (2nd ed.) (Paris : Montchrestien, 1995), p. 66; J.L.Kunz (1953), p. 666. Article 38 of the ICJ Statute refers to a general and not a universal practice. See also *North Sea Continental Shelf cases*, ICJ Rep. 1969, p. 3, 104 (Judge Ammoun) and 229 (Judge Lachs); *Barcelona Traction case, ICJ Reports 1974*, p. 330 (Judge Ammoun).

[165] *North Sea Continental Shelf cases,* p. 43, para. 73. See also R.R.Churchill & A.V.Lowe (1999), p. 7.

[166] Barbaris has pointed out : 'En outre, lorsqu'on évalue la généralité d'une pratique on considère essentiellement la pratique de certains pays selon le thème dont il s'agit.... Dans ce sens, on peut dire que certains Etats sont 'représentatifs' lorsqu'il s'agit d'une activité déterminée', J.A.Barbaris (1990), p. 24; see also M.Sorensen, 'Principes de droit international public', 101 *Hague Recueil* (1960-III), p. 40; P.Reuter 'Principe de droit international public', 103 *Hague Recueil* (1961-II), p. 464; M.Akehurst (1974-5), p. 23.

referred to land-locked states which for being land-locked 'would have no interest in becoming parties' to the Geneva Convention on the Law of the Sea and therefore their particular practice would be of no interest.[167] Therefore, in the case of midocean dependent archipelagos the practice of the continental states possessing such archipelagos should be taken into consideration when assessing the general practice of states for the creation of customary international law, as states not possessing an archipelago are not eligible to apply such a system.[168]

Is a majority of the states eligible to perform such practice required?[169] In both the Continental Shelf cases (*Tunisia/Libya* and *Libya/Malta cases*) the Court accepted that the concept of the EEZ had become part of international law[170] despite the fact that less than a majority of the states eligible to claim such a zone had proceeded to such a declaration.[171] However, in these cases the Court took into consideration the fact that the EEZ had been adopted in the Law of the Sea Convention, which was not yet in force.

As presented in Chapter 3, the practice of continental states in their outlying archipelagos in relation to the baselines system to be used for the measurement of the territorial sea is diverse. There are states which have not applied any special system in their outlying archipelagos and which are using the low-water mark on the coast of

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[167] *North Sea Continental Shelf cases*, p. 43, para. 73, (dissenting opinion of Judge Tanaka) p. 177, (dissenting opinion Judge Lachs) 228, 230. Sorensen states that 'en face de telles problèmes que ne se posent pas universellement il faut admettre que la pratique qui entre en ligne de compte est celle des Etats qui ont l'occasion d'agir dans le domaine en question', M.Sorensen (1961), p. 40. See *Akehurst's Introduction to International Law* and the comments on the case of the Legality of Nuclear Weapons P.Malanczuk (1997), p. 42.

[168] The reaction of the rest of the states of the international community whose interests might be affected by the particular practice will be examined in a following subsection; see *infra* p. 233 *et seq.*

[169] Akehurst connects the number of states required for the formation of customary law with the nature of the rule under formation: he stresses that 'a practice followed by a very small number of states can create a rule of customary law if there is no practice which conflicts with the rule' and further points out that 'a great quantity of practice is needed to overturn existing rules of customary law', M.Akehurst (1974-5), p. 18-9. Mendelson seems to agree with this view but adds that even in the case where the practice of few states is adequate the practice should be 'sufficiently general'; M.Mendelson (1998), p. 222-3; Wolfke also observes that nowadays the practice of a state and the reaction of other states to this practice may be made known to the international community in a very short period of time due to the advancements of technology in communications and therefore suggests that it is possible for a rule of customary law to arise on the basis of a few manifestations of state practice (precedents), K.Wolfke (1993), p. 60.

[170] *Tunisia/Libya case*, p. 74, para. 100; *Libya/Malta case*, p. 33, para. 34.

[171] M.Mendelson (1998), p. 221-222. He observes, though, that the Court was more cautious with regard to the establishment of a rule of customary law in the *Tunisia/Libya case* (it used the phrase 'may be regarded as part of modern international law') as the number of states claiming an EEZ was limited and did not include the major maritime powers, the USA and the USSR; whereas in the *Libya/Malta case*, which came a few years after the *Tunisia/Libya case*, the ICJ used a more positive language ('is shown by the practice of states to have become part of international law') as the practice of states was more extended and included the practice of the USA and the USSR.

each island as the baseline for the measurement of the maritime zones.[172] This divergence in practice may be explained on the basis of the geographic realities of the archipelagos and the perception of states regarding the limits of the application of straight baselines to groups of islands. Particularly, in the cases where no special system has been applied, the archipelagos are scattered in a broad maritime space; in such case, the application of straight baselines would lead to the enclosure of a large maritime area restricting importantly the freedom of navigation. On the contrary, most instances of state practice where a straight baseline system has been applied concern closely-knit archipelagos where the enclosed waters are closely linked to the land domain of the islands.[173]

There are, however, cases of closely-knit archipelagos for which no special system for the measurement of the maritime zones has been prescribed.[174] The reluctance of states to follow the precedent of other states and apply a straight baseline system in their outlying archipelagos may also be explained on the basis of the uncertainty in international law regarding the validity of the precedents particularly in the face of oppositions raised by maritime powers and particularly the US.[175] Indeed, the USA has always expressed its opposition to the application of the archipelagic concept in the case of dependent outlying archipelagos and this may explain the non-application of any special regime in its outlying archipelagos, some of which are, indeed, closely-knit such as the Hawaiian Islands or the Aleutian archipelago.[176]

In so far as the existing practice of states concerns closely-knit archipelagos, the non-application of special systems to broadly-scattered groups of islands[177] should not

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[172] See Chapter 3, p. 167 *et seq.*. Some examples of these states are India (Andaman and Nicobar Islands), Netherlands (Netherlands Antilles), the USA (Hawaiian Islands, Aleutian Archipelago, Florida Keys, Midway Islands, Virgin Islands), New Zealand (Cook Islands). Some states seem to have left open the possibility of applying such a system; see Chapter 3 Spain, p. 150 and India, p. 167-168.

[173] The only exception is the straight baseline applied by China in the Paracel Islands.

[174] States possessing such archipelagos are Brazil, Chile, Colombia, Italy, Mexico, Nicaragua, Panama, Russia, Yemen.

[175] Thirlway contends that 'divergent practice may, on examination, prove to be capable of explanation in a number of different ways'; H.Thirlway (1990), p. 82. Shaw states that 'the reasons why a particular state acts in a certain way are varied but are closely allied to how it perceives its interests', M.N.Shaw (2003), p. 75. For an analysis of the connection between state practice and states' interests and costs see M.Byers (1990), p. 151-3. Villiger suggests that the existence of a contrary conventional rule (in the present case this could be argued to be the absence of a provision prescribing a system for groups of islands) could retard the process of the formation of a customary rule, as states will be reluctant to abrogate their contractual obligations; M.Villiger (1985), p. 223.

[176] Particularly, for the case of Hawaii see Chapter 3, p. 169 *et seq.*.

[177] For this distinction see *infra* p. 250 *et seq.*.

affect the uniformity of practice leading to the establishment of customary law. As will be analysed in a following subsection, this practice has led to an emerging customary rule concerning solely this category of archipelagos. However, before reaching a final conclusion with regard to the status of customary law in the case of dependent midocean archipelagos, it should be examined whether this practice is accompanied by the subjective element (*opinio juris sive necessitatis*) and finally which is the reaction of the international community to this practice.

B. The subjective element

The elusiveness of the concept of *opinio juris sive necessitatis* as the subjective constituent element of customary law has given rise to conflicting theories with regard to its necessity and its application.[178] Nevertheless, the relevance of *opinio juris* as a constituent element of customary law has been emphasised by the ICJ in many of its judgments[179] and continues to be accepted by authors.[180] Without desiring to engage at this point in a theoretical discussion on *opinio juris*, which would exceed the scope of the present thesis, the 'traditional' approach, as adopted by the ICJ, accepting the necessity of *opinio juris* as a constituent element of customary international law[181] will be followed without at the same ignoring some of the problems occurred in the quest of its ascertainment.

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[178] Thirlway characteristically states that 'the precise definition of the *opinio juris* ... has probably caused more academic controversy than all the actual contested claims made by states on the basis of alleged custom put together'; H.Thirlway (1972), p. 47. For an overview of these theories see A.D'Amato (1971), p. 49-56.

[179] See *infra* notes 183 and 188. Dinh, Daillier and Pellet acknowledged, on one hand, the theoretical and practical problems created by *opinio juris* but pointed out that 'la jurisprudence internationale demeure néanmoins très ferme sur la question de principe', p. 303. See also Combacau, Sur (1994), p. 67; M.D.Shaw (2003), p. 82. Mendelson alleges, however, that the pronouncements of the Court 'were actually made, for the most part, in special circumstances, and that it is not in fact necessary to demonstrate the presence of the subjective element in all, or perhaps even most, instances'; M.Mendelson (1998), p. 250

[180] J.L.Kunz (1953), p. 665; M.Akehurst (1974-5), p. 36-7. I.Brownlie (2003), p. 8-10; M.N.Shaw (2003), p. 80-3.

[181] The 'traditional' approach supporting the custom-forming value of both state practice and *opinio juris* has been contrasted to what has been called by authors following the Nicaragua case the 'modern' approach to customary law formation referring to the priority attributed to the *opinio juris* of states particularly in cases where the moral issues at stake were high. (For the contrast between the 'traditional' and 'modern' approaches to international custom see D.P.Fidler, 'Challenging the Classical Concept of Custom: Perspectives on the Future of Customary International Law' 39 German Yearbook of International Law (1996), p. 199 *et seq,,* A.E.Roberts, 'Traditional and Modern Approaches to Customary International Law: A Reconciliation' American Journal of International Law (2001), p. 757, H.C.M.Charlesworth, 'Customary International Law and the Nicaragua Case', 1984-7 *AYIL*; p. 27, F.L.Kirgis, 'Custom in a sliding scale', 81 (1) *AJIL* (1987), p. 101 *et seq* p. 149; on the contrary see A.D'Amato, 'Trashing Customary International Law' 81 (1) *AJIL* (1987), p. 101 *et seq*.

I. Opinio juris sive necessitatis

Opinio juris sive necessitatis has been described as the element which differentiates custom from mere state practice or usage.[182] The notion of this principle has been summarised in the oft-quoted extract from the *North Sea Continental Shelf cases* where the Court pronounced that the states should have the 'belief that this practice is rendered obligatory by the existence of a rule of law requiring it' and that the 'states concerned must ... feel that they are conforming to what amounts to a legal obligation'.[183]

The Court specifically referred to a rule of law posing an obligation upon states to act in a particular way. In international law, however, rules appear both in the form of obligations, namely, rules obliging states to act in a specific way but also in the form of rights, that is, rules giving 'a state a liberty to act in a particular way without making such conduct obligatory'.[184] In the case of permissive rules *opinio juris* concerns the belief of a state that its practice is consistent with a rule of law.[185] The relevance of the *opinio juris* of the states engaged in a practice concerning a permissive rule of law has been rejected by some authors, who claim that in the case of customary rights what is important is the opinion of the states affected by the exercise of the right,[186] but has been accepted by others, who do not distinguish between rules 'expressed in terms of obligatoriness' or 'permissibility'.[187] The ICJ,

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[182] I.Brownlie (2003), p. 6; M.N.Shaw (2003), p. 80; M.Akehurst (1974-5), p. 33; Mendelson suggests, however, that *opinio juris* should be thought 'as a means of distinguishing, not so much (or only) one class of rules from another, but those instances of state practice which count towards the formation of law from those which do not'; M.Mendelson (1998), p. 272. On the contrary, Danilenko contends that state practice carried out in areas of inter-state relations which objectively require legal regulations cannot be the subject of international comity and therefore the *opinio juris* as a differentiating element has no applicability; G.Danilenko (1998), p. 36.

[183] *North Sea Continental Shelf cases,* p. 44, para. 77; similarly, *Lotus case,* PCIJ Series A, No. 10, 1927, p. 28.

[184] M.Akehurst (1974-5), p. 37. The ICJ in the *Lotus case* referred to these rules as permissive, *Lotus case,* p. 18-9. See also *Right of Passage over Indian Territory,* p. 40: 'The court is in view of all circumstances of the case satisfied that the practice was accepted as law by the parties and has given rise to a right and a correlative obligation'.

[185] Mendelson provides a 'working' definition of *opinio juris*: 'it is a belief in the legally permissible or obligatory nature of the conduct in question or of its necessity'; M.Mendelson (1998), p. 269.

[186] I.C.McGibbon (1957), p. 126. Thirlway seems to recognise the validity of this distinction but asserts that *opinio juris* is pertinent in the case of customary rights in so far as it manifests a state's opinion with regard to the limits of its claim in international law: the state 'does not make its claim because it believes that international law requires it to do so, but it limits its claim because it believes that international law requires it to do so'; H.Thirlway (1972), p. 48.

[187] M.Mendelson (1998), p. 269; He points out that 'the way in which *opinio juris* can be revealed varied according to the nature of the rule in dispute. In the case of a permissive rule, it may be possible to find express statements that States are permitted to act in a particular way'. But even Mendelson finds a differentiating element in the matter regarding the evidence of *opinio juris*; he points out that

however, has not made any distinction and has required the existence of *opinio juris* in cases concerning permissive rules.[188] However, despite this theoretical debate, the examination of the *opinio juris* of the states engaged in a particular practice is certainly important for ascertaining the *content* of the rule of customary law as has evolved through practice.[189]

One of the initial problems of *opinio juris* concerns the evidence of its existence, that is, finding out what the *opinio* of states with regard to the legality of their actions is. As D'Amato points out 'states often do not give official explanations of their conduct, nor should we expect them to do so'.[190] This is aggravated by two factors: firstly, the access to state documents is not easy, especially in the case where these documents constitute unclassified or unpublished documents of the state

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'express statements are not necessary to establish a permissive rule; a claim that states are entitled to act in a particular way can be inferred from the fact that they do act in that way'. With regard to the last point see also M.Akehurst (1974-5), p. 38. Elias also endorses this view – albeit in a differentiated way - stressing that *opinio juris* is not really relevant as long as a state has expressed its consent with regard to a particular rule of international law; he presents the following example with regard to the distinction between customary law rights and obligations: 'if States A to M deliberately exploit the resources of the exclusive economic zones of States N to Z, it would be easier to say that States A to M have willed/consented to a different regime or have an *opinio juris* different from the old one than it would be to prove that the States in question believed their actions to be in accordance with an existing rule of law': O.Elias, 'The nature of the Subjective Element in Customary International Law', 44 *ICLQ* (1995), p. 515.

[188] The relevance of *opinio juris* in both types of rules, permissible and obligatory, has been recognised – though implicitly - by the ICJ in the *Asylum case* where it was stated that 'the Colombian government must prove that the rule invoked by it is in accordance with a constant and uniform usage practised by the States in question and that this usage is the *expression of a right appertaining to the state granting asylum and a duty incumbent on the territorial state* (emphasis added)'; *Asylum case*, p. 276-7. See also the *Right of Passage case* where the Court stated that the practice with regard to persons, civil officials and goods 'was accepted as law by the Parties and has given rise to a right and a correlative obligation' (p. 40) but that 'no right of passage in favour of Portugal involving a correlative obligation on India has been established in respect of armed forces, armed police and arms and ammunition; *Right of Passage over Indian Territory,* p. 43. Moreover, the ICJ has pronounced the necessity of *opinio juris* in cases where permissive rules of international law were concerned. In the Continental Shelf cases (*Libya/Malta, Tunisia/Libya*) the Court found that the notion of the EEZ had evolved to be considered as a rule of customary international law; *Tunisia/Libya case,* p. 74, para. 100; *Libya/Malta case,* p. 33, para. 34; Mendelson contends that the reference to *opinio juris* in the Libya/Malta case did not have any particular significance but composed 'a ritual repetition of the usual 'two element' definition'; M.Mendelson (1998), p. 286.

[189] Mendelson while rejecting the role played by *opinio juris* in the formation of customary law points out that 'it has a useful part to play in helping us to determine what practice does not *count* towards the formation of custom – or, to put it differently, what is being *claimed* in the legal context (emphasis in the original text)', M.Mendelson (1998), p. 288.

[190] A.D'Amato (1971), p. 85. He quotes the following sources where the *opinio* of states may be found: journals in international law, leading textbooks, reports of legal decisions affecting international law, resolutions of international organisations, diplomatic correspondence, treaties, draft conventions of the ILC, resolutions of the GA of the UN, p. 86. See also K.Zemanek (1997), p. 157 et seq.

concerned; the second problem refers to the difficulty to retrieve the *opinio* of states even in the case where the relevant documents are accessible. [191]

In most of its judgments the ICJ did not refer to particular documents in order to infer the *opinio juris* but examined the general conduct of states in a way 'presuming' the opinion of the states concerned.[192] The *opinio juris* of a state may be deduced by appraising its general conduct[193] as well as its official and unofficial declarations.[194]

a) *Opinio juris* inferred from state conduct

With regard to straight baseline systems applied by states in their outlying archipelagos, it may be argued that by adopting legislation and applying these systems states have expressed their opinion that they consider this system to be allowed by international law. The consistency of their practice, the repetition of such practice in various legislative acts[195] or in some cases the gradual application of a similar system in more than one archipelago in their possession[196] may reveal their belief that their acts are consistent with international law.

The *opinio* of these states may also be evidenced by the statements and the position taken by the delegates of these states during UNCLOS III, when the issue of the archipelagic regime was discussed. All these states emphasised the *'necessity'* of

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[191] As Dinh, Dailler and Pellet point out 'les actes des Etats souverains reposent toujours sur des mobiles complexes ou s'entremêlent le droit et la politique. Lorsque l'*opinio juris* ne résulte pas de facteurs objectifs, la vérification de son existence qui nécessite une recherche approfondie des intentions soulève des problèmes délicats, parfois insolubles'.N.Q.Dinh, P.Daillier, A.Pellet (1980), p. 304.

[192] I.Brownlie (2003), p. 8 (and reference cited therein); N.Q.Dinh, P.Daillier and A.Pellet point out that in certain cases the ICJ has accepted a flexible position by considering that the material element, when solidly established, may lead to the evidence of the psychological element, p. 304

[193] See C.De Visscher, *Theory and Reality in public international law* (Rev. ed.) (translated by PE.Corbett) (Princeton, N.Jersey, Princeton University Press, 1968), p. 154, note 23 (referring to the *Asylum case* he argued that '*opinio juris* may perfectly well be inferred from the external qualities of the precedents invoked especially from their coherence or discordance'); S.P.Seferiades, 'Aperçus sur la Coutûme Internationale et notamment sur son fondement', 43 *RGDIP* (1936), p. 144); H.Silving, 'Customary Law: Continuity in Municipal and International law', 31 *Iowa law review* (1946), p. 626; Judge Azevedo's dissenting opinion in *Asylum case*, p. 336; K.Wolfke (1993), p. 70.

[194] A statement clarifies the position of a state with regard to the norm-creating process initiated by its practice. M.Akehurst (1974-5), p. 37.

[195] See, for example, the case of Ecuador which has a reference to the straight baseline system in various decrees referring to the Galapagos Islands, and particularly in the Law establishing the Marine Reserve, Chapter 3, p. 140 *et seq.*.

[196] See, for example, France applied a straight baseline system around the Kerguelen islands in 1978, in 1999 she applied such a system in Guadeloupe in the Caribbean Sea and in 2002 she applied such a system in the Loyalty Islands; Norway also enacted legislation promulgating straight baseline for parts of the Svalbard archipelago in 1970 and in 2001 extended this system around the whole archipelago and around a small group of islands in the eastern part of the main archipelago applying in this way the 'archipelagic concept' in a more straightforward way. Similarly, Denmark applied a straight baseline system initially in the Faroe Islands and subsequently in the Sjaelland, Laesø and Christiansø group of islands.

the application of the archipelagic concept in the case of dependent outlying archipelagos and pressed during the negotiations for the adoption of a relevant provision within the LOSC.[197] Therefore, there is indeed an *opinio necessitatis* in the practice of these states, that is, a belief that the particular system is 'required by social, economic or political exigencies'.[198] It should be, however, acknowledged that the statements of the delegates of the states engaged in the practice is indicative of the fact that they consider the application of a special system for dependent midocean archipelagos as *lex ferenda* and not as *lex lata*.[199] However, the continuation of the application or the establishment of straight baseline systems around their archipelagos following the adoption of the LOSC may demonstrate that they consider that their conduct is not contrary to general international law despite the failure of the Conference to provide for such a regime.

b) Statements by acting states demonstrating their *opinio juris*

Some states have expressed their *opinio juris* in statements made in reply to protests raised by other states and particularly the USA. In their diplomatic replies these states presented their views regarding the legality of the baselines systems applied in their archipelagos.

Following a USA protest against the baseline system applied by Denmark in the Faroe Islands, the Danish Ministry of Foreign Affairs replied in a *note verbale* dated

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[197] See Chapter 1, p. 40, 47-48.

[198] A.Cassesse (2001), p. 119; *Opinio necessitatis* may well be, as accepted by authors, an adequate subjective element for the formation of customary law (There are authors who have tried to circumvent the problem of the circularity of *opinio juris* by invoking the consciousness of states of moral or social needs L.E.Le Fur, 'Regles generales du droit de la paix, 54 *Hague Recueil* (1935), p. 198); G. Scelle, 'Règles Générales du droit de la paix', 46 *Hague Recueil* (1933), p. 434; A.Cassese (2001), p. 157-8; Thirlway points out that 'the requirement of *opinio juris* is equivalent merely to the need for the practice in question to have been accompanied by either a sense of conforming with the law or the view that the practice was potentially law as suited to the needs of the international community'; H.Thirlway (1972), p. 53-4; it is, however, important that this belief of necessity is 'transformed' in the views of states into a belief of legality; see also A.Cassese (*ibid*), p. 157.

[199] See the Joint Separate Opinion of five judges in the *Fisheries Jurisdiction case* (Forster, Bengon, Jimenez de Arechaga, Nagendra Singh, Ruda): 'It is true that, as the Court's Judgement indicates, the proposals and preparatory documents made in the aforesaid context (referring to the proposals filed by states in relation to or in preparation for the Third Conference on the Law of the Sea) are de *lege ferenda*. However, it is not possible in our view to brush aside entirely these pronouncements of states and consider them devoid of all legal significance'. They, hence, concluded that 'once the uncertainty of such a practice is admitted, the impact of the aforesaid official pronouncements, declarations and proposals must undoubtedly have an unsettling effect on the crystallisation of a still evolving customary law on the subject.' *Fisheries Jurisdiction cases*, p. 48, para. 12. H.Thirlway (1990), p. 64 commenting on the fore-mentioned opinion of the Judges pointed out that 'for the five judges statements and proposals at international conferences are valuable in the quest for rules of customary international law as 'evidence of what states are prepared to claim and to acquiesce in' in other words as items of state practice'.

3rd October 1991, which stated the following: 'these baselines *are permitted in international law in view of the compact nature of the group of islands involved* (emphasis added). The islands, 18 in all, are lying so close together, that a hypothetical 3-mile limit, drawn around each separate island without the use of any straight baseline would create a continuous outward boundary around the island group as a whole. In consequence, the Danish Government has since 1927, without meeting with any protest, declared the sounds between the islands to be internal water. Cf. Ordinance No. 4 of 21 February 1927 concerning access of foreign warships to Danish waters and harbours in peacetime. The baselines laid down in Ordinances Nos. 598 and 599 were determined in accordance with Article 4 of the above mentioned (1958) Geneva Convention (on the Territorial Sea and the Contiguous Zone). Article 4 (4) states that in determining the particular baselines account may be taken of the economic interests peculiar to the region concerned, the reality and importance of which are clearly evidenced by a long usage. This is highly relevant to the Faroe Islands in view of their dependence on fisheries in the areas defined by the baselines. It may be recalled that a special resolution was adopted in 26 April 1958 in connection with the Convention of 29 April 1958 on fishing and conservation of the living resources of the high seas designed to safeguard the interests of countries or territories heavily dependent on fisheries in waters bordering their territorial seas. At the introduction of this resolution it was underlined that among others it referred in particular to the Faroe Islands'.[200]

The language of the Danish reply to the American protest evidences Denmark's legal understanding that the applied straight baseline system is compatible with international law.[201] Indeed, the Danish government seems to be justifying its actions on the basis of the archipelagic concept and particularly 'the compact nature of the group of islands involved'.[202] It invokes the geographical particularities of the archipelago and specifically the adjacency of the islands as creating a compact whole. It continues by invoking historical reasons and especially the fact that Denmark has always considered the archipelago as a whole and the waters between the islands as

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[200] American Embassy Copenhagen telegram 07435, Oct. 24, 1991 as quoted in J.A.Roach & R.W.Smith (19964), p. 114.

[201] See similarly in the *Fisheries case* the Norwegian Reply to the French protest against the 1869 Decree and the conclusion of the Court which stated that 'language of this kind can only be construed as the considered expression of a legal conception regarded by the Norwegian Government as compatible with international law': *Fisheries case*, p. 136.

[202] See *supra* note 200.

internal without any protest from other states. It seems that Denmark invokes the criteria used by the ICJ in the *Fisheries case* in a way as to make them applicable to the case of a group of islands. Particularly, she stresses that the adjacency of the islands, the dependence of the local population on the natural resources of the waters between and surrounding the islands evidenced by long usage necessitate that a system of straight baselines should be applied around the whole archipelago.

Any reference made by Denmark to article 4 of the TSC was intended to refer to the conditions posed for the drawing of straight baselines; therefore, in applying the archipelagic concept on the basis of the adjacency of the islands and their subsequent consideration as a compact whole, the conditions for the drawing of the baselines as embodied in article 4 of the TSC have been applied. The position adopted by Denmark on the issue of the application of straight baselines in the case of archipelagos has been enhanced by the subsequent application of such a system in the case of other groups of islands in 1999 (Sjaelland, Laesø, Christiansø).[203]

Similarly, some indications with regard to the *opinio juris* of Portugal may be inferred from her response to the USA protest filed in 1986 against the baseline system applied in the Azores and Madeira islands. Particularly, the Portuguese response was as follows: 'a reading of the geographic coordinates cited in the Annex to this Decree-Law demonstrates that the procedure adopted in locating the relevant baselines of the Azorean and Madeiran archipelagos was not predicated on Part IV of the Convention, but rather the authority comes from its article 121 (Part VIII), which refers to the applicable dispositions of geographic formations in general'.[204]

It is clear from this last note of the Portuguese government that despite the fact that in the Decree the term archipelagic baselines has been used,[205] the Portuguese government does not consider these lines to be applicable by virtue of Part IV of the LOSC (regarding archipelagic states) but according to article 121. Article 121 refers to the general principles applied for islands without specifying any system of baselines. The legal basis, which Portugal invokes, is not clear but it may be assumed that the invocation of article 121 of the LOSC - and not of a specific conventional provision concerning baselines - may be interpreted as meaning that this state believes that the system applied is not prohibited by international law.

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[203] See Chapter 3, p. 128-9 (Sjaelland and Laesø), 159 (Christiansø).
[204] Portuguese Ministry of Foreign Affairs Note DSA 3057 33/EUA/3 of Nov. 28, 1986 to the American Embassy in Lisbon as quoted in J.A.Roach & R.W.Smith (1996), p. 112-3.
[205] See Chapter 3, p. 152-154.

Finally, Iran in its responses to states protesting against its legislation regarding the internalisation of the waters between islands has expressed its opinion that it considers the method applied as consistent with international law stating that 'there is nothing in international law to prohibit the use of that method'.[206]

The cases where the express *opinio* is stated are few but it may be assumed that these states have the belief that international law permits the establishment of straight baselines joining groups of islands which are located in close vicinity to each other and the internalisation of the enclosed waters.

c) *Opinio juris* and the LOSC

A last consideration to be made concerns the question of whether the potential invocation of conventional rules (and particularly article 7 of the LOSC) for the justification of their baselines systems on behalf of the rest of the practising states[207] (*opinio juris conventionalis)* may negate the establishment of customary law on the basis of the absence of *opinio juris*.

As stressed by Villiger 'it would appear ... that for the signature or the ratification of a convention or the subsequent practice of the parties, to have any significance on the formation of customary law, the *opinio juris* would have to be demonstrated beyond the mere contractual obligation'.[208] Similar thoughts regarding the importance to be attributed to the practice of states which are presumably acting within the limits of the contractual obligations were advanced by the ICJ in the *North*

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[206] See Note No. 641/1206 dated 3 May 1995 addressed to the Embassy of the French Republic at Tehran in response to the protest filed by Germany on behalf of the European Union concerning the Act of 2 May 1993 on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and in the Sea of Oman, 31 *Law of the Sea Bulletin* (1996), p. 37; Letter dated 18 October 1996 from the Permanent Representative of the Islamic Republic of Iran to the UN addressed to the Secretary-General referring to a note verbale dated 20 August 1996 from the Permanent Mission of Qatar to the UN, 33 *LSB* (1997), p. 87; Comments from the Islamic Republic of Iran concerning the viewpoints of the Government of the USA regarding the Act on Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Oman Sea of 2 May 1993, 26 *LSB* (1994), p. 35.

[207] It should be noted that there are no explicit official statements on behalf of the practising states that they are indeed considering their actions as deriving purely from the LOSC; D'Amato stresses that 'a given state's legal advisers even when they are not divided among themselves as to the legal status of any alleged rule are reluctant to file out opinions on the content of international law in the absence of a concrete dispute or a codification convention'; A.D'Amato (1971), p. 50-51. In the same context, D'Amato argues that 'there is a fundamental difference between what we as observers think a state thinks and what the state in fact thinks, or feels, or has a conviction about'; (A.D'Amato, *ibid*, p. 73). In this respect, what a state might think or believe of its actions may only be assumed and it is unsafe ascribing to States legal views which they have not themselves advanced. Some conclusion may, however, be drawn by the actions themselves and particularly the context of the application of the straight baseline systems.

[208] M.Villiger (1985), p. 12.

Sea Continental Shelf cases: '... over half the States concerned, whether acting unilaterally or conjointly were or shortly became parties to the Geneva Convention, and were therefore presumably, so far as they are concerned acting actually or potentially in the application of the Convention' and thus 'from their action no inference could legitimately be drawn as to the existence of a rule of customary international law in favour of the equidistance principle'.[209] However, in the latter case the content of the conventional rule and the potential customary rule coincided, as the issue examined by the ICJ was whether the conventional rule, namely article 6 (2) of the Geneva Convention on the Continental Shelf had acquired the status of customary law. The Court found that the practice of states was in conformity to their contractual obligations.

In the *Nicaragua case*, the ICJ accepted the existence of customary international law functioning in a parallel way to and having the same content with article 2 (4) of the UN Charter. However, the Court did not preclude the possibility that customary international law might have acquired a different content to the one prescribed in the UN Charter. In order to determine the existence and the content of customary law, the ICJ examined the conviction of states beyond their contractual obligations. Particularly the Court stated that 'apart from the treaty commitments binding the parties to the rules in question there are various instances of their having expressed recognition of the validity thereof as customary international law in other ways'; in this respect, the ICJ after appraising the voting of states for various resolutions in the General Assembly, concluded that 'the effect of consent to the text of such resolutions cannot be understood as merely that of a 'reiteration or elucidation of the treaty commitment undertaken in the Charter. On the contrary it may be understood as an acceptance of the validity of the rule or set of rules declared by the resolution by themselves. ... It would therefore seem apparent that the attitude referred to expresses an *opinio juris* respecting such rule (or set of rules), to be thenceforth treated separately from the provisions, especially those of an institutional kind, to which it is subject on the treaty-law plane of the Charter'.[210] Similarly, Cheng pointed out that despite the existence of treaty obligation, states may have an *opinio juris* beyond their *opinio obligationis conventionalis* when they accept 'the rule as one of general

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[209] *North Sea Continental Shelf cases*, para. 76, p. 43-44.
[210] *Nicaragua case*, p. 99-100, para. 188.

international law applicable among all subjects of the legal system and subject to all the rules governing the observance of rules of general international law'.[211]

In the case where customary law evolves in a complementary way alongside a treaty either modifying or interpreting its provisions, *opinio juris* serves, as observed by Villiger, to distinguish 'modification via adaptation from interpretative variations of the conventional rule'.[212] The *opinio juris* of States parties to a treaty should thus reveal their intention to fill any potential gaps of the treaty or cover situations not dealt – or admittedly dealt unsatisfactorily - by the treaty.

Most of the continental states which have applied straight baselines to their outlying archipelagos, as examined in Chapter 3, enacted their legislation before they became parties to the LOSC and therefore, at the point of the enactment of their legislation they could not be regarded as having an *opinio juris conventionalis.*[213] Some of them were, however, parties to the TSC[214] and it might be considered that they were acting within the rights attributed to them by that Convention.[215] However, as mentioned above, at the specific time context (late 70s – 80s), the proliferation of straight baseline claims in groups of islands were based on the belief that since the TSC did not prohibit the drawing of straight baselines in groups of islands,[216] such baselines could be applied on the basis of the principles enunciated by the ICJ in the *Fisheries case* and primarily the 'general direction of the coast' rule.[217] Moreover, the fact that these states had been motivated by the archipelagic concept in the application of the particular straight baseline systems is evidenced by the objections raised by some states which oppose the existence of any rule in international law reflecting the archipelagic concept.[218]

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[211] B.Cheng, 'On the nature and sources of International Law', in B.Cheng (ed.), *International Law: Teaching and Practice* (London: Stevens & Sons, 1982), p. 224-5.

[212] M.E.Villiger (1985), p. 221. On the effect of subsequent practice upon the interpretation of article 7 of the LOSC see Chapter 2, p. 99-102.

[213] From the practising states mentioned in Chapter 3, Ecuador, Eritrea, Iran and the United Arab Emirates are not parties to the LOSC.

[214] These states are Denmark, Portugal, Spain, Australia and the UK; the *opinio juris* of the first three was dealt with above where their written statements on the justification of their baseline systems were analysed; see *supra* p. 226-8.

[215] Article 4 of the TSC has the exact same wording as article 7 of the LOSC regarding the application of straight baselines in coasts deeply indented and cut into or fringed with islands.

[216] It is obvious that considering that a conventional rule does not prohibit specific action is not cognate with the existence of an *opinio juris conventionalis;* in the absence of such conventional prohibition, a specific practice may be considered as lawful on the basis of general international law.

[217] See Chapter 1 the views advanced by authors on the interpretation of the TSC, note 222.

[218] D'Amato presents the following example with regard to the function of protests and the responses to them in international law: 'When state A protests the act of state B, state A is effectively calling attention to the legal consequences of B's act. ... The effect of the protest may be to articulate a legal

For example, Australia mentions article 4 of the 1958 Convention on the Territorial Sea and the Contiguous Zone in her legislation proclaiming the application of a straight baseline system. It may be, therefore, inferred that Australia has the belief that this system is consistent with a conventional rule of law embodied in the TSC. Neither article 4 of the TSC, which has the exact same wording as article 7 of the LOSC, nor any of the other provisions of the TSC included any reference to the issue of groups of islands, as relevant proposals during the Geneva Conference in 1958 were rejected. However, at the time of the enactment of the Australian legislation there was a belief in international law that the general wording of article 10 of the TSC[219] and the 'concept of the 'general direction of the coast' when translated into 'general direction of the periphery' would justify the application to archipelagos of the straight baseline system provided in article 5'.[220] What is more, it might be that reference to article 4 concerned the conditions regarding the choice of basepoints and the exact drawing of straight baselines and not the judicial basis for such practice. Thus, it may be argued that Australia's presumed *opinio juris* exceeds the limits of the rights attributed by the Convention.[221]

Moreover, it may be inferred from state practice, as analysed above, that the straight baseline systems as applied by continental states in their outlying archipelagos exceed the limits set by article 7 of the LOSC. In this sense, states are motivated by and are applying not the formalistic perception to the straight baseline principle as prescribed in article 7 of the LOSC[222] but a broader one based upon the principles enunciated by the ICJ in the *Fisheries case*.[223] Particularly, these states seem to share

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norm with respect to B's act. If B claims that its act is legal and then continues to act in the same way, its conduct will constitute the beginning of an international custom', A.D'Amato (1971), p. 101.

[219] Article 10 of the TSC provides '1.An island is a naturally-formed area of land, surrounded by water, which is above water at high tide. 2. The territorial sea of an island is measured in accordance with the provisions of these articles'.

[220] D.P.O'Connell (1982), p. 255. Reference to article 5 should be considered probably as a typographic mistake and the author should have meant article 4. As pointed out by O'Connell this is one of the views supported at the time, the other being that article 10 of the TSC by not mentioning archipelagos 'resolved the question of groups of islands in favour of the freedom of the seas', *ibid*. See also Chapter 1 note 222 on the conflicting opinions of scholars at that time regarding archipelagos.

[221] See article 4 (2) (d) of the Proclamation of 4 February 1983.

[222] As observed in Chapter 3, article 7 of the LOSC is inapplicable in most cases of state practice.

[223] The exact content of the customary rule deriving from state practice and their justification will be examined *infra*, p. 249 *et seq*. Similarly as noted by Fitzmaurice with regard to the formation of customary law 'at first, although in such circumstances some or a number of States may deny that the previous or normal rule is as pretended, or may question its universal validity, they will be conscious (even if they do not admit any actual illegality) of acting unusually or at any rate differently from the manner in which they have previously been used to act or in which most or a number of other States have acted'. G.Fitzmaurice (1957), p. 115; and he continues 'at some point however if the process

the belief that the general rule of international law regarding the straight baselines principle does not coincide with the conventional rule regarding the application of straight baselines in the geographic realities specified in articles 7 – 10 of the LOSC but has a wider spectrum than this. As accepted in the Nicaragua case, it may be argued that the general principle evolves in a parallel way and alongside the provisions of the Convention[224] completing its content and expanding the spectrum of application of straight baselines.[225]

However, as Kunz observes for a rule of customary law to be established 'not only must the states which applied the practice have had this conviction (that is, *opinio juris*) but this conviction must not have been challenged by other states'.[226] Therefore, the reaction of the states of the international community vis-à-vis the practice of continental states with regard to their midocean archipelagos should be examined and its relevance to the formation of customary law should be assessed.

II. The reaction of the international community

Consent or acquiescence of the states of the international community vis-à-vis a particular practice has been treated as a substantial element in the formation of customary international law – though the degree of significance allocated to this notion by different authors varies.[227] The ICJ has also examined the reaction of other

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continues and is not checked by some other event or development there will arise a conviction of action in accordance with what has become a normal practice. If this conviction is shared by the great majority of states a new customary rule of law will have come into existence'.

[224] See *supra* note 210.

[225] Kontou states that 'a treaty may be interpreted in the light of supervening custom that completes or clarifies its provision'; N.Kontou (1994), p. 16.

[226] J.L.Kunz (1953), p. 667.

[227] Positivist authors, who consider custom as a tacit agreement among states, regard consent as the corner stone in the establishment of customary international law: see for example K.Strupp, 'Les regles générales du droit de la paix', 47 *Hague Recueil* (1934), p. 319; G.I.Tunkin, 'Co-Existence and International law', 95 *Hague Recueil* (1958), p. 13; G.Danilenko (1988), p. 35; K.Wolfke (1993), p. 61-4; more recently, A.T.Guzman, 'Saving Customary International Law', 2005 *American Law and Economics Association Annual Meetings*, Paper 30, p. 30 et seq. I.C.McGibbon (1957), p. 115 *et seq.*; O.Elias (1995), p. 501 *et seq.*; M.O.Hudson, Article 24 of the Statue of the ILC, Document A/CN.4/16, Working Paper, Special Rapporteur, *ILCYB* Vol. II (1950), p. 26; See also G.Fitzmaurice (1953), p. 68. Authors rejecting the consensual basis of custom do not discard the concept of acquiescence which is thought to be relevant in the customary process not as a law-formation factor but as evidence that a rule of customary law has evolved. As Mendelson suggests, state consent may be a sufficient but not necessary factor for the ascertainment of the establishment of a rule of customary law. M.Mendelson (1998), p. 260. In the same spectrum Pellet argues that the express acceptance of a customary rule 'has, no doubt, important practical effects in facilitating proof both of the existence of the rule in general and of its application to the accepting state', A.Pellet, 'The Normative Dilemma: Will and consent in International Law-Making', 12 *Aust.YBIL* (1988-9), p. 37; see similarly Gaja ('acceptance of a rule contributes to its effectiveness; however, it cannot be held that no effective rule exists until it has been accepted') in A.Cassese and J.H.H.Weiler (eds), *Change and Stability in International Law Making* (Berlin: Walter de Gruyter, 1988), p. 16. O'Connell admitted that 'absence of protest is very relevant as

states when assessing the facts leading to the formation of a rule of customary international law.[228] Therefore, whereas the acquiescence of states may lead to the formation of customary international law, its counter-notion, that is the notion of protest, may impede this evolution. Akehurst characteristically refers to the function of acquiescence and protest as following: 'if actions by some states (or claims that they are entitled to act) encounter acquiescence by other States, a permissible rule of international law comes into being; if they encounter protests, the legality of the actions in dispute is, to say the least, doubtful'.[229] In the following subsections the opposition and the protests of some states against the practice of continental states in their outlying archipelagos and the absence of protests on behalf of others will be analysed and the impact of these behaviours upon the possibility of the emergence of a customary rule will be assessed.

(a) Opposition and Protests

(i) General

Protest normally refers to diplomatic protests, which have been defined by Oppenheim as 'a formal communication from one state to another that it objects to an act performed or contemplated by the latter' serving 'the purpose of preservation of rights or of making it known that the protesting state does not acquiesce in and does not recognise certain acts'.[230] This is, indeed, the most common way for a state to object to the alleged illegality of a claim.[231] However, the notion of protest has a broader context and may include not only diplomatic protests but also any kind of

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a test of the value of unilateral acts' but rejects it as a necessary condition for the establishment of a rule of law; D.P.O'Connell, 'Sedentary Fisheries and the Australian Continental Shelf', 49 *AJIL* (1955), p. 194. See also M.N.Shaw (2003), p. 84-5; M.Akehurst (1974-5), p. 33, p. 38 *et seq.*.

[228] *Fisheries case*, p. 138 *et seq.*; In the *Lotus case* the ICJ discussed the issue of effect of protest on the establishment of a rule of customary law (p. 23, 29); and according to Bos's (1982, p. 40) and Akehurst's (1974-5, p. 41) interpretation the ICJ has accepted protests as a means of preventing the emergence of a rule of customary rule.

[229] M.Akehurst (1974-5), p. 39. He points out that 'the motives of the states concerned (in protesting or not) are irrelevant. ... What counts is what State A says or refrains from saying in public, not what State A secretly believes'.

[230] L.Oppenheim, *International Law* Vol. I (7th ed., by Lauterpacht, 1948), p. 789.

[231] The importance of diplomatic protests as an obstacle in the formation of customary or prescriptive rights has been emphasised by many authors: See Y.Z.Blum (1965), p. 154. I.C.McGibbon (1954), p. 171, who stressed the significance of diplomatic protests as 'a constantly recurring feature of the diplomatic practice of states; see also K.Wolfke (1993), p. 62 (note 48). Contrary Fitzmaurice in the *Minquiers and Ecrehos case*: 'diplomatic protest is now of greatly reduced significance'; *Minquiers and Ecrehos case*, (France/UK, Judgment of 17th November 1953), *ICJ Pleadings*, Vol. II, p. 366; There is a debate whether diplomatic protests are a sufficient means for reserving states' rights or impeding the formation of customary law. This debate is briefly examined *infra* note 238.

statement advanced or action performed by the state, from which its objection to a legal or factual situation may be inferred.[232]

As regards the designation of straight baselines around dependent outlying archipelagos, there are some states which have not officially protested against this practice of continental states but it may be inferred from their statements that they oppose the particular practice. When ratifying the LOSC, the Netherlands filed a declaration that it would not accept any archipelagic claims from states, which did not meet the conditions of article 46 of the LOSC.[233] This could be interpreted as opposition to the application of straight baselines in the case of dependent archipelagos. However, the Netherlands has not filed any official protest against the practice of any of the states applying such a system.

Moreover, there were five states, which during UNCLOS III expressed their opposition to the extension of the archipelagic regime to dependent midocean archipelagos;[234] it may be inferred from this position that these states have not accepted the state practice of continental states and are hostile to the potentiality of the formation of customary international law. However, the general and vaguely articulated opposition of these states cannot impede the formation of customary law. What is more, the non-repetition of these objections in combination with the absence of official protests on their behalf may signify the abandonment of their opposition or their acquiescence.[235]

It is accepted that protests in general may impede the formation of customary international law. However, in evaluating the impact of protests upon the emerging rule one should take into consideration, according to O'Connell, 'the number of protests, the vehemence of the protests, the subsequent actions of all parties, the importance of the interests affected and the effluxion of time'.[236] The protest must be

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[232] Suy states that there is no rule of international law requiring in most instances a special form for the juridical acts including protests; E.Suy (1962), p. 49; on the contrary McGibbon argues that the element of formality is essential to the validity of protests, I.C.McGibbon (1953), p. 294.

[233] The relevant paragraph of the Dutch Declaration is as follows: 'The application of Part IV of the Convention is limited to a State constituted wholly by one or more archipelagos, and may include other islands. Claims to archipelagic status in contravention of article 46 are not acceptable. The status of archipelagic State, and the rights and obligations deriving from such status, can only be invoked under the conditions of part IV of the Convention'. The declaration of the Netherlands may be found at http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm

[234] See Chapter 1, p. 42. These states were Turkey, Algeria, Tunisia, Thailand and Burma.

[235] See *infra* the analysis on the notion of acquiescence p. 241 *et seq.*.

[236] D.P.O'Connell (1971), p. 63.

raised by a number of states[237] at the initiation of the practice and thus a protest from one state cannot be deemed as a sufficient means for impeding the formation of customary law. It is also argued that it is not expected that a state takes action in support of its protest[238] but it is necessary that the protest[239] is repeated over time[240] in order to show that the state's conduct has been consistent with regard to the particular issue; in the case that the state does not repeat its protest – not solely a diplomatic protest but any manifestation of its intention to oppose the specific claim - and based on the circumstances precluding a contrary presumption, this state - despite its initial protest - may be presumed to have abandoned its objections and have acquiesced in the other state's claim.[241]

(ii) Diplomatic protests against specific instances of state practice

The state, which has objected and protested against most of the national laws proclaiming a straight baseline system around groups of islands, is the USA. This

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[237] Akehurst observes that 'isolated protests in the face of repeated claims are probably insufficient to prevent the growth of a customary rule based on such claims'; he further stresses the connection between the number of protests and the interests affected by the acts or claims and points out that if an act 'affects the interests of many states, protests by a small number of those states will carry little weight': M.Akehurst (1974-5), p. 40. See also Gidel stating that 'il parait impossible d'exiger ni que la reconnaissance de cet usage soit rigoureusement 'universelle' ni qu'elle soit expresse. Une seule contestation émanant d'un seul Etat ne saurait infirmer un usage', G.Gidel (1934), p. 634. Blum also points out that '... the protest of a single state will not be deemed sufficient to invalidate and nullify a practice which has been repeatedly resorted and acquiesced in, by other States'; Y.Z.Blum (1965), p. 167. For the relevance of the protests of a single state see I.C.McGibbon (1953), p. 317.

[238] This mainly concerns the question of whether the filing of diplomatic protests may be deemed as an adequate means for the reservation of a state's rights in international law; various positions have been advanced. It has been argued that solely 'paper' protests are not enough and that states should either take action against the claim or address the issue to an adjudication international body; see D.H.N.Johnson, 'The Anglo-Norwegian Fisheries Case', 1 *ICLQ* (1952), p. 346; E.Suy (1962), p. 75-6, 78-9 (and references therein); Based on the proceedings in the *Minquiers and Ecrehos case* and particular the position taken by the UK, McGibbon concluded that International Tribunals would require evidence of positive initiative on behalf of the protesting state towards the settlement of the dispute through the use of 'all available and appropriate international machinery for that purpose'; I.C.McGibbon (1953), p. 313; Judge Carneiro, individual opinion in *Minquiers and Ecrehos case*, p. 108). G.Schwarzenberger (1957), p. 307. See also UK's Counsel in *Fisheries case* (*Fisheries case*, Pleadings, Vol. II, p. 653-4, 656, 678). However, there is no indication in international law that the protesting state should undertake 'forcible' action in order to retain its rights and establish its legal position. On the other hand, it is argued that diplomatic protests may be sufficient for the reservation of rights in international law as long as a clear and continuous opposition is illustrated; see I.Brownlie (2003), p. 149; T.D.Gill, 'The forcible protection, affirmation and exercise of rights by states under contemporary international law', 23 *NYIL* (1992), p. 143; M.E.Villiger (1985), p. 15-7; G.Danilenko (1988), p. 41; France's arguments in *Minquier and Ecrehos case*, Oral Pleadings, Vol. III, p. 384; M.Akehurst (1974-5), p. 41; D.A.Colson, 'How persistent must the persistent objector be?, 61 *Washington Law Review* (1986), p. 963-4.

[239] When referring to protests we are referring to any kind of state action manifesting the objection of the state and not only to diplomatic protests.

[240] R.Jennings & A.Watts (eds), *Oppenheims's International Law Vol. I, Peace* (9th ed.) (Harlow: Longman, 1992), p. 706; G.Fitzmaurice (1953), p. 29.

[241] *Fisheries case*, p. 136-7; see *supra* note 83.

opposition is not surprising, as the US is one of the foremost advocates of the freedom of the seas and its hostile position with regard to the application of an archipelagic regime for dependent midocean archipelagos was clearly expressed during the Third Conference on the Law of the Sea.[242]

The United States government protested against the Ecuadorian claim in the Galapagos archipelago on two occasions in 1951 and in 1986.[243] Similarly, in 1991 it protested against the application of a straight baselines system around the Faroe archipelago by a note sent to the American Embassy in Copenhagen.[244] The basis of its objection was that the Danish delimitation of the territorial sea around the Faroes was incompatible to the provisions of the LOSC regarding baselines.[245] Particularly, the State Department declared that 'the baselines around the Faroes are not straight baselines around individual islands, but are lines connecting the outermost islands and drying rocks of the Faroe archipelago. Archipelagic States recognised under customary international law, as reflected in the LOS Convention, do not include mainland states, such as Denmark and the United States, which possess non-coastal archipelagos. Therefore straight baselines cannot be drawn around mainland states' coastal archipelagos such as the Faroe Islands'.[246] The note concluded that in localities where article 7 in inapplicable 'the method of straight baselines may not be used; rather in those areas the low water line as depicted on official charts must be used'.[247]

The United States Government protested also against the claims raised by Portugal regarding the delimitation of the territorial sea of the Azores and Madeira Islands. In a note sent to the American Embassy in Lisbon, the State Department raised the following issues: 'Certain of the baselines around the Madeira and the Azores Islands groupings are objectionable for the same reasons, ie they do not lie in localities where the coastlines are deeply indented and cut into nor do they connect a fringe of islands along a coast in its immediate vicinity. Moreover, insofar as concerns

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[242] See P.E.J.Rodgers (1986), p. 173 for an outline of the position of the USA during the work of the Informal Working Group on Archipelagos. See also the Hawaiian case, Chapter 3, p 169 *et seq.*.
[243] See *supra* p. 199-200.
[244] American Embassy Copenhagen Nos. 061 and 065 of July 12 & 18, 1991, State Department telegram 223707, July 9, 1991; American Embassy Copenhagen telegram 02435, Oct. 24, 1991 as quoted in J.A.Roach and R.W.Smith (1996), p. 113-4.
[245] See also *Limits in the Seas, No. 42: Straight Baselines: Ecuador* (US Department of State, Office of the Geographer, Bureau of Intelligence and Research, May 1972), p. 6 &7.
[246] *Ibid.*
[247] *Ibid.*

the Madeira and the Azores Island groupings, archipelagic baselines cannot be justified under customary international law as reflected in part IV of the 1982 Law of the Sea Convention as Portugal is not an 'archipelagic state', but in fact it comprises a mainland continental state with island components'.[248]

The United States has also made known to the United Kingdom government their concerns with regard to the straight baselines used in the Falkland Islands.[249] The US government has also protested against the provisions of the Sudanese Act through a note to the American Embassy in Khartoum in June 1989.[250]

Lastly, the US protested against the Iranian act according to which the waters between the islands will be considered as internal waters of the state. Particularly the US stated that 'islands may not be used to define internal waters, except for situations where the islands are part of a valid straight baseline system or of a closing line for a juridical bay. ... (The Iranian) claim has no basis in international law'.[251] Similar objections were raised by the EU[252] and Qatar.[253] It is, though, strange that none of these states protested against the similarly drafted provision of the Federal Law of the United Arab Emirates which was enacted the same year as the Iranian act. It is true that the latter legislation provided for the internalisation of the maritime space between islands not exceeding 12 n.m. (in contrast to the Iranian decree which provided for 24 n.m.) but still this does not justify the inaction of these states vis-à-vis the law of the United Arab Emirates, particularly as their objection was based on the

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[248] Excerpt from the State Department telegram 266998, Aug. 25, 1986 delivered to the American Embassy Lisbon in the fall of 1986 as quoted in J.A.Roach & R.W.Smith (1996), p. 112-3.
[249] J.A.Roach & R.W.Smith (1996), p. 122.
[250] Diplomatic Note from the American Embassy Khartoum delivered 6th June 1989. State Department telegram 174664, 2 June 1989; American Embassy Khartoum telegram 06535, 7 June 1989, as quoted in J.A.Roach and R.W.Smith (1996), p. 117. In the same note, the US government criticised the failure of the Sudanese government to publish the maps in which the promulgated straight baselines appear. The US had protested against the intention of Saudi Arabia to extend seaward of a belt of 3 n.m. along its coasts or around its islands (Note Dated 19 December 1949 from the government of the USA to the government of Saudi Arabia as quoted in *Fisheries case, ICJ Rep., Pleadings*, Vol. IV, p. 601).
[251] Protest from the United States of America, 11 January 1994, 25 *LSB* (1994), p. 101. It would be interesting to see whether the USA and the other protesting states would have filed a protest if the same result, that is the internalisation of the waters between the islands was achieved through the use of straight baselines joining the coasts of the islands.
[252] Demarche of 14 December 1994 by the German Embassy in Tehran concerning provisions of Iranian national law not compatible with the international law of the Sea, 30 *Law of the Sea Bulletin* (1996), p. 60.
[253] *Note verbale* outlining the position of Qatar with regard to the promulgation by the Islamic Republic of Iran of the Act entitled 'Act on the Marine Areas of the Islamic Republic of Iran in the Persian Gulf and the Sea of Oman, 1993', 32 *Law of the Sea Bulletin* (1996), p. 89.

fact that such delimitation of the territorial sea was inconsistent with international law.[254]

The UK and Germany protested against the Ecuadorian claim in the Galapagos in 1951 and in 1986 respectively.[255] As mentioned in the previous subsection, the effects of UK's protest have been weakened by its further inaction after its diplomatic protest in 1951 and its subsequent use of a similar system for some of its archipelagic territories.[256] Furthermore, the late protest of the German government and its further inaction after that diplomatic protest could also be indicative of a weakening of the objection.[257]

Therefore, the only state to have clearly and consistently protested against the claims of continental states is the USA. The only instance of the USA's attempt to actively challenge the baseline system concerns the Faroe Islands, where the US Navy performed an operational assertion in 1991.[258] There is no other known incident where the USA tried to enforce its protest against the straight baselines applied to outlying dependent archipelagos.[259]

As observed above, a single protest by a single state cannot prevent the formation of customary international law, but in so far as the US has expressly and in many occasions stated its position on the issue and objected the application of such a regime in the case of outlying archipelagos, it could be accepted that in the potential emergence of a rule of customary law permitting the application of such a regime by

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[254] It could be though inferred that the protest against the Iranian law and the inaction against the law of the United Arab Emirates is based on political reasons as long as the relations between Iran and Western states are turbulent.

[255] See *supra* p. 199.

[256] See *supra* p. 199.

[257] See *supra* p. 199.

[258] Information found at the Defence Technical Information Centre of the US Department of Defence and particularly in the following website: http://www.dtic.mil/whs/directives/corres /20051m_062305/Denmark_Dependencies.doc For the Freedom of Navigation Programme established in the USA as a means of challenging excessive maritime claims through the filing of diplomatic protests or the performance of operational assertions by the US Navy see *Limits in the seas, No. 112, US Responses to Excessive Maritime Claims* (US Department of State, Bureau of Oceans and International Environmental and Scientific Affairs, 1992), p. 6. See also US Department of Defense, Freedom of Navigation FY 2000-2003 Operational Assertions (found at www.defenselink.mil/policy/sections/policy_ offices/isp/fon_fy00-03.html).

[259] However, Colson rightly points out that 'one would hope that a continuing clear statement of position is sufficient in international law to maintain one's legal place, without the need actually to provoke others and risk confrontation for the simple sake of maintaining a legal position', p. 963-4 and he adds that if a state takes actions for the protection of its legal interests against the action of another state 'the potential for (dangerous?) confrontation exists' and this may 'become an inefficient and expensive means of promoting national policy': D.A.Colson (1986), p. 964.

continental states, the USA is not bound by the rule on the basis of the concept of the persistent objector as accepted by international scholars[260] and the ICJ.[261]

Finally, the case of the Chinese claim of straight baselines in the Paracel Islands should be considered separately because of the sovereignty problem of this archipelago, as the neighbouring states have protested against this claim both on the basis of the sovereignty dispute and of the incompatibility of the applied system with international law.

Vietnam objected the Chinese Declaration on the baselines for the measurement of the territorial sea by a *note verbale* communicated by the Permanent Mission of the Socialist Republic of Vietnam to the United Nations on 6 June 1996.[262] Vietnam objected the Chinese declaration on a two-fold basis: primarily, Vietnam objected the claim of China to delimit the territorial sea of the Paracel Islands or as referred by Vietnam the Hoang Sa archipelago (Xisha Islands for China) as this action 'constitutes a serious violation of the Vietnamese sovereignty over the archipelago'[263]. The note verbale continues by stating that Vietnam 'has on many occasions

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[260] The fact that the notion of the persistent objector has been accepted by the majority of authors reveals that the existence of protests against a particular practice cannot stop the evolution or emergence of a rule of customary law. See D'Amato who considers that protests cannot impede the formation of customary international law; A.D'Amato (1971), p. 101-2. Villiger has also stated that 'the rule is not called in question by the diverging practice of some persistent objectors', M.E.Villiger (1985), p. 15-17; In general on the issue of the persistent objector see M.Akehurst (1974-5), p. 24-7; Danilenko (1988), p. 41; I.Brownlie (2003), p. 11; D.A.Colson (1986), p. 957 et seq.; T.L.Stein, 'The approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 *Harvard International Law Journal* (1985), p. 457 *et seq.*;. Restatement of the Foreign Relations Law of the United States (Revised), Section 102, Comment (d), p. 26. There are authors who argue that even persistent objectors are bound by customary international law: M.Bos (1982), p. 46; J.I.Charney, 'The Persistent Objector rule and the development of customary international law', 56 *BYIL* (1985), p. 17-21; A.Cassese (2001), p. 163.

[261] See *Fisheries case* where the Court pointed out with regard to the existence of a rule of customary international law limiting the closing line of bays to 10 n.m. that even if there was such a rule it would not be binding upon Norway as 'she has always opposed any attempt to apply it to the Norwegian coast'; *Fisheries case*, p. 131. D'Amato argues that the Court referred to a special custom between the UK and Norway and therefore this passage does not support the doctrine of the persistent objector; A.D'Amato (1971), p. 252-4, 261. For a contrary interpretation of the *dictum* of the Court see M.Akehurst (1974-5), p. 25 and H.Thirlway (1972), p. 110. See also the *Asylum case* where the ICJ stated that 'even if it could be supposed that such a custom existed between certain Latin-American States only, it could not be invoked against Peru which far from having by its attitude adhered to it, has, on the contrary, repudiated it …'; *Asylum case*, p. 277-8.

[262] *LSB*, No. 32 (N.York: Office for Ocean Affairs and the Law of the Sea, 1996), p. 91. See also a *note verbale* communicated by the Permanent Mission of the Socialist Republic of Vietnam to the United Nations on 6 August 1998 regarding the Law on the Exclusive Economic Zone and the Continental Shelf of the People's Republic of China, where Vietnam protested again against the establishment of the territorial sea baselines of the Hoang Sa archipelago by stating that 'it is not in conformity with international law, constitutes a serious violation of the Vietnamese territorial sovereignty, runs counter to international law and is absolutely null and void'; *LSB No. 38* (N.York: Office for Ocean Affairs and the Law of the Sea, 1998), p. 54.

[263] *Ibid.*

reaffirmed its indisputable sovereignty' over the Hoang Sa archipelago. Furthermore, Vietnam objected this declaration on the basis of its incompatibility with the provisions of the LOSC regarding archipelagos. Particularly, Vietnam stated that 'the People's Republic of China correspondingly violated the provisions of the 1982 United Nations Convention on the Law of the Sea by giving the Hoang Sa archipelago the status of an archipelagic state to illegally annex a vast area into the so-called internal waters of the archipelago'[264].

The Philippines in a Statement regarding the ratification by China of the United Nations Convention on the Law of the Sea communicated by the Permanent Mission of the Philippines to the United Nations on 17 May 1996 expressed its concern regarding the Chinese declaration 'proclaiming baselines around the group of disputed islands known as the Paracels'[265]. The Philippines has not specified whether their concern stemmed from the incompatibility of the application of a straight baseline system in a dependent archipelago with the LOSC or from the disputed sovereignty of the archipelago. It would, however, seem, that its primary concern refers to the latter particularly as it was further stated in the *note verbale* that 'China's action in a disputed part of the South China Sea disturbs the stability of the area, sets back the spirit of cooperation that has been slowly developing in the South China Sea and does not help in the resolution of the disputes there'.[266]

The US Department of State in its publication of the Limits in the Seas criticised the way China applied a system of straight baselines around the Paracel Islands. It stated that the proper baseline for the islands would be the low-water mark around each island as the application of straight baselines on the basis of article 7 of the LOSC cannot meet the conditions this article specifies.[267] Furthermore, China, as a continental state cannot apply a system of archipelagic baseline around the archipelago as that would be incompatible to Part IV of the LOSC, which restricts the archipelagic regime to archipelagic states, that is states constituted wholly by archipelagos.[268]

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[264] *Ibid.*
[265] *Ibid*, p. 88.
[266] *Ibid.*
[267] *Limits in the Seas, No. 117, China: Straight Baseline Claim*, p. 8.
[268] *Ibid.* It further points out that even if hypothetically China had the right to apply the archipelagic regime in the Paracel Islands, the water-to-land ratio required by article 47 of the LOSC would be exceeded.

(b) Absence of protests and the notion of acquiescence

A state may accept the practice of another state and potentially its law-creating value either explicitly, through an express statement[269] or implicitly by acting in a way from which its acceptance could be inferred or by remaining silent. As Wolfke suggests tacit acceptance is fulfilled by means of 'presumption based upon various kinds of active or passive reactions to the practice by the interested states'.[270]

(i) Acceptance inferred from active conduct

With regard to the positively perceived tacit acceptance, there are states, which seem to have accepted the straight baseline systems applied by continental states in their midocean archipelagos. During UNCLOS III there were certain states, such as Greece, India, Canada, Peru, Chile, Honduras, Argentina, Iceland, Mexico, New Zealand[271] which supported the proposals for the attribution of an archipelagic regime to dependent outlying archipelagos.[272] Their position during the negotiations of the Conference may show that they perceived the application of a special regime for dependent midocean archipelagos as *lege ferenda*. However, this perception in combination with the absence of protest against any state practice could justify the conclusion that they have accepted the practice of continental states in their archipelagos as lawful.

In some particular cases, as has been analysed in the previous subsection for the Faroe Islands, the acceptance of the baseline systems may be inferred by the conclusion of various agreements with the neighbouring states regarding mutual fisheries rights or delimitation of overlapping maritime space.[273] Similar evidence exists for the case of the Galapagos Islands.[274]

(ii) Significance of divergent practice: does divergent practice manifest opposition?

Byers argues that the practice adopted by a state is indicative of its perception regarding the law-creating value of the practice of others and the status of customary

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[269] It is true that an express statement of acceptance is not common in practice: G.Danilenko (1988), p. 34-5.
[270] K.Wolfke (1993), p. 62
[271] It should also be noted that in one of the first drafts presented at the beginning of UNCLOS III, two archipelagic states, Mauritius and Indonesia supported the attribution of the archipelagic regime to archipelagos forming part of a continental state; see Chapter 1, p. 40, note 118.
[272] See Chapter 1, p. 40.
[273] See *supra* p. 191 *et seq.*.
[274] See *supra,* p. 197 *et seq.*.

international law. He argues that 'practice consistent with a potential, emerging or existing rule indicates support for that rule, that practice inconsistent with the rule indicates opposition to it and that an absence of practice in the area governed or potentially governed by the rule indicates ambivalence to the rule and may as a result constitute acquiescence'.[275] On the basis of this observation, the application of the normal baseline rule in outlying archipelagos by certain continental states would be thought to denote their opposition to the emerging rule. This could be true in some instances particularly when the conflicting practice is combined with an active opposition to the emerging rule, as is the case with the USA.[276] However, as mentioned above there are plenty of reasons why a state would not adopt a particular practice.[277] Often the decision made by a state to pursue a particular policy is connected with how this state perceives its interests at the particular political and historical context, especially when this context is characterised by uncertainty created by conflicting practice.[278] Therefore, the non-application of a straight baseline system by some states in their outlying archipelagos should not be interpreted as opposition to the particular practice as performed by others.[279]

(iii) Significance of silence: does lack of protest manifest acquiescence?

Most of the states of the international community have not protested against the designation of straight baselines in dependent outlying archipelagos.

During UNCLOS III most of the states did not express their opposition to the potential application of a special system for the delimitation of maritime zones of dependent outlying archipelagos[280] nor did they raise any concerns regarding the actual application of straight baselines by some continental states at that time. What is more, as was argued in Chapter 1, the exclusion of dependent midocean archipelagos from the archipelagic regime adopted by the Conference cannot be regarded as reflecting a lack of acceptance by the states of the international community since this

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[275] M.Byers (1999), p. 152. See also Villiger who points out that a state impliedly shows its dissent by abstaining from a practice or by adhering to a different one; M.E.Villiger (1985), p. 15. I.M.L.deSouza, 'The Role of State Consent in the Customary Process', 44 (3) *ICLQ* (1995), p. 529.

[276] The same could be said about the Netherlands which has not applied an archipelagic baseline system in the Netherlands Antilles because of the dependent political status of the archipelago.

[277] See *supra* note 175.

[278] The political context is also very important; for example Greece has not applied any straight baseline system in the Aegean Sea presumably due to the dispute with Turkey; see Chapter 3, p. 173 *et seq.*.

[279] The adherence of states to the use of the low-waters in the coasts of each island was treated within the ambit of the material element of customary law concerning the generality of state practice.

[280] See Chapter 1, p. 43.

exclusion does not signify a real *consensus* with regard to the particular subject[281] but it is a politically dictated decision at the political context of the Conference.[282]

To assess whether the silence or absence of protest on behalf of the states of the international community may be interpreted as tacit acceptance one should examine the notion of acquiescence. The exact definition of acquiescence is a matter of debate. It is accepted that acquiescence should be interpreted as a negative concept[283] signifying 'the inaction of a State which is faced with a situation constituting a threat to or infringement of its rights' and may take 'the form of silence or absence of protest in circumstances which generally call for a positive reaction signifying an objection'.[284] In the *Gulf of Maine case* the Court defined acquiescence as 'equivalent to tacit recognition manifested by unilateral conduct which the other party may interpret as consent founded upon the principles of good faith and equity'.[285]

Absence of protest may be ascribed to various reasons such as diplomatic and political considerations or mere lack of interest[286] but it is argued that depending on the circumstances silence on behalf of a state may amount to acquiescence.[287] Absence of protest may signify acquiescence provided that the silent state was aware of the practice[288] and its interests or rights were affected by it.[289]

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[281] Wolfke, concludes that 'in such a situation it seems difficult to consider consensus as a fulfilment of the subjective element of custom. ... It is, however, certain that this kind of presumed agreement constitutes at any rate a factor speaking for the 'acceptance of the custom-forming practice as law. Its final effect must, however, be evaluated in each case in the light of all the prevalent circumstances – that is, whether such practice and the intention to accept it as law are actually at stake', K.Wolfke (1993), p. 63-4.

[282] See Chapter 1, p. 42-46, 59-60.

[283] Y.Z.Blum (1965), p. 132-3; I.C.McGibbon (1954), p. 143.

[284] McGibbon (1954), p. 143.

[285] *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/USA, Judgment of 12th October 1984) *ICJ Reports*, p. 305, para. 130.

[286] A.D'Amato (1971), p. 70, 196. M.D.Shaw (2003), p. 85-6. G.Fitzmaurice (1953), p. 33; D.Anzilotti (1929), p. 344. D.P.O'Connell points out that 'absence of protest is, however, of relative value. States may not protest for a variety of reasons unconnected with the law. They may not know of the practice or they may be indifferent to it for reasons of geographical or economic irrelevance'; D.P.O'Connell (1971), p. 18.

[287] McGibbon stresses that 'whether silence is to be interpreted as amounting to acquiescence depends primarily on the circumstances in which silence is observed; I.C.McGibbon (1954), p. 170. Fitzmaurice also states that 'absence of opposition is relevant only in so far as it implies consent, acquiescence or toleration on the part of the States concerned; but absence of opposition *per se* will not necessarily or always imply this. It depends on whether the circumstances are such that opposition is called for because the absence of it will cause consent or acquiescence to be presumed': G.Fitzmaurice (1953), p. 33. G.Danilenko (1988), p. 33. Villiger refers to 'qualified silence'; M.E.Villiger (1985), p. 19.

[288] I.C.McGibbon (1954), p. 168, 173-8. See G.Fitzmaurice (1953), p. 33. M.E.Villiger (1985), p. 20. The ICJ in the *Fisheries case* assumed that the UK due to its maritime interests in the North Sea was aware of the system applied by Norway; *Fisheries case*, p. 139; see also the dissenting opinions of Judges Sir A.McNair (pp. 171-2), Judge M.Read (p. 194, 199, 201).

Assessing, therefore, the absence of opposition on behalf of the states of the international community vis-à-vis the baseline systems applied in dependent midocean archipelagos, it should be considered whether third states were aware of the system applied and whether their rights were affected by this practice.

The systems applied by continental states upon their archipelagos have always been known to other states. In the Document prepared by Evensen for the Geneva Conference on the Law of the Sea in 1959 on the issue of the delimitation of the territorial sea of a group of islands, there was a mention of the straight baseline systems applied in the Faroes, the Galapagos and the Svalbard archipelago.[290] What is more, all national laws regarding the application of such a system have been published in the Law of the Sea Bulletin and the website of the UN Division for Ocean Affairs and the Law of the Sea where all states have access and can be instantly informed with regard to any practice applied by states.[291]

The question of whether third states interests are affected by the application of straight baselines to archipelagos should also be answered in the affirmative.[292] The application of straight baselines has led to the proliferation of the internal waters of continental states and to the seaward extension of the maritime zones generated by

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[289] D.P.O'Connell (1971), p. 18. M.Akehurst points out that 'failure to protest against an assertion *in abstracto* about the content of customary law is less significant than the failure to protest against concrete action taken by a State in a specific case which has an immediate impact on the interests of another State'; he also stresses that the number and vehemence of the protests needed to ... prevent acts and claims creating a contrary rule vary according to the extent to which the acts or claims affect the interests of other states': M.Akehurst (1974-5), p. 40. See Danilenko who stresses that the two conditions for the consideration of the absence of protest as implicit consent is that the practice affects indirectly or directly the interests of the inactive states and secondly that the state should be aware of the particular practice, G.Danilenko (1988), p. 40. Similarly, G.I.Tunkin (1974), p. 129; J.P.Kelly, 'The twilight of customary International Law' 20 *VJIL* (2000), p. 473.

[290] Jens Evensen (1958), p. 297-8.

[291] Mendelson contends that '... information relevant to the formation of customary law is becoming more and more widely disseminated, so that it becomes harder for a state not to know about at least the main developments, without having to maintain a delegation in every capital': M.Mendelson (1998), p. 350. Wolfke K.Wolfke (1993), p. 62; see also the dissenting opinion of Judge Tanaka in the *South West Africa Cases (second Phase), 1966 ICJ Reports*, p. 250, 291.

[292] Most of the objections against archipelagic claims were based on the potential threat of these claims upon third states' interests and rights traditionally exercised in the waters enclosed within the archipelagic baselines; see Chapter 1, p. 42-43. Danilenko considers that there are certain areas of relations between states that are of common interests and 'therefore cannot fail to affect in one-way or another the interests and rights of all states without exception'; G.Danilenko (1988), p. 40. He specifically refers to the exploration of outer space but it is evident that the law of the sea is also among these areas of international relations which concern all states; see also I.Brownlie (2003), p. 157. M.Mendelson (1998), p. 257. In the *Anglo-Norwegian Fisheries case*, the ICJ pronounced that the absence of protest on behalf of other states denoted the 'general toleration of the international community' with regard to the baseline applied by Norway in her coasts without examining whether these states were individually affected by the system or interested in the case; *Fisheries case,* p. 138-139.

these baselines.[293] Therefore, third states' rights such as freedom of navigation or economic rights such as fishing rights are curtailed. Particularly affected are the rights of states neighbouring the archipelagos or states traditionally engaged in fishing or other economic activities in the region.

It is, however, true that in most instances the systems of straight baselines have been applied in a 'cautious' way, that is, states have joined together islands which are in a close vicinity to each other refraining from enclosing large areas of the sea.[294] In this sense, it could be argued that the states of the international community do not feel threatened by the particular practice as their rights are not curtailed in such a degree so as to protest against the baselines systems particularly as they do not want to jeopardise their political relations with the practising states. Reisman and Westerman invoke an interesting 'political' justification regarding the absence of protest or objection on behalf of third states – 'the conspiracy of silence' as they refer to it - by saying that 'the *modus operandi* of third states appears to have been 'Don't oppose my straight baselines and I won't oppose yours'.[295] This reciprocity in the mutual acceptance of the straight baselines applied by states may show that states are not hostile in the emergence of a customary law permitting states to apply straight baselines to groups of islands.

Moreover, the absence of protest cannot be considered as having no consequence in international law. States are generally aware that their inaction to a particular practice may lead to the formation of customary law.[296] Therefore, if states

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[293] W.M.Reisman & G.S.Westerman (1992), p. 105-7 who argue that the use of straight baselines result in the encroachment of coastal state jurisdiction upon the high seas and the international seabed which is the common heritage of mankind. However, as observed by Prescott, the gain in maritime space from the use of straight baselines (he refers to straight baselines in general and not to straight baselines applied in the case of archipelagos) would depend upon various factors such as the length of the baseline segment, the distance of that segment from the coast, the configuration of the coast in that locality and the proximity of the conflicting claims of third states; J.R.V.Prescott in G.Blake (1987), p. 48.

[294] See *infra* regarding the content of the emerging customary law as formed by the practice of continental states in their outlying archipelagos, p. 250 *et seq.*.

[295] W.M.Reisman & G.S.Westerman (1992), p. 190.

[296] This approach is connected with the existence of secondary rules in international law regarding customary law formation. This view is mostly reflected in positivist authors' writings: G.Danilenko observes that 'international law contains a number of rules that supply a legal framework in which a non-objecting state would know in advance that, under certain conditions, its passivity would be interpreted as approval of the emerging custom, as a manifestation of the will to recognise the legally binding character of practice'; G.Danilenko (1988), p. 40; see also by the same author, *Law Making in the International Community* (Dordrecht: Martinus Nijhoff Publ., 1993), p. 108. Similarly, K.Wolfke (1993), p. 62. D'Amato argues that acquiescence inferred from the silent conduct of indirectly or non-affected states 'does not relate to the primary rules but rather to the propriety of the processes (the secondary rules) by which the primary rules were created'; A.D'Amato (1971), p. 198. De Souza refers

want to exclude this possibility and retain their rights as expressed in international law, they should in a way or another object to this practice, and the most common way to express their objection would be through a diplomatic protest or through an action ascertaining their rights in international law.[297]

In the *Fisheries case*, the Court after examining whether the UK was aware of the system applied by Norway in her coasts and taking as evident that her interests in the area were indeed affected by the application of such a system, accepted that the absence of protest on behalf of other states denoted the 'general toleration of the international community' with regard to the baseline applied by Norway in her coasts.[298]

Summarising the elements analysed above, it should be noted that the straight baseline systems have been applied by continental states to their midocean archipelagos for many years[299] without protest or opposition on behalf of most of the states of the international community despite the fact that these states were aware of this practice and despite the fact that their rights were impaired. These elements in combination with the awareness of states regarding the possibility of the evolution of customary rules stemming from the particular practice could lead us to the conclusion that the states of the international community have acquiesced in this practice.

4.4.2 Concluding remarks:

A. What is the current status of dependent midocean archipelagos in customary international law ?

Having completed the analysis of the constituent elements of customary law as presented in the case of dependent midocean archipelagos, the question posed at the introduction of this Chapter, that is whether there is a rule of customary international law giving states the right to adopt a straight baseline system around their outlying archipelagos for the measurement of their maritime zones will be answered.

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to secondary rules as 'superior rules which regulate the creation of international rules, their modification and their application'; I.M.DeSouza (1995), p. 539.

[297] Colson points out that the written and verbal objections and the actions taken by states 'not only protect its (the state's) legal position in regard to the State making the new claim, but it serves notice to other states that it will strongly resist any change in customary legal relationships', D.A.Colson (1986), p. 969.

[298] *Fisheries case*, p. 138-139.

[299] I.C.McGibbon points out that 'the presumption of consent which may be raised by silence is strengthened in proportion to the length of the period during which the silence is maintained'; I.C.McGibbon (1954), p. 143; Villiger also states that 'only after a certain period of time does passive conduct qualify as tacit acceptance', M.E.Villiger (1985), p. 34.

With regard to the generality of practice, some explanations regarding its diversity were given above based on the geographic particularities of archipelagos; these particularities influence the perception of states regarding the system to be applied or preferably regarding the rule on the basis of which this system will be applied to outlying archipelagos. Nevertheless, it cannot be said that the practice has attained the uniformity required for the ascertainment of customary law. The ICJ has been reluctant to accept the evolution of customary law in fields where there is divergence of practice. In many cases the Court took into consideration the implications arisen by the different practice followed by states[300] and concluded that the diversity in state practice could not support the existence of a rule of international law.[301]

It should, however, be emphasised that the practice as presented above represents a considerable amount of state practice on the subject. It should also be stressed that divergence in practice, when all the other elements of customary law concur, may retard[302] but not intercept the procedure of the formation of customary law. As pointed out by Akehurst, in the case where 'the states supporting the change and the states resisting the change are fairly evenly balanced' change 'is difficult and slow and disagreement and uncertainty about the law may persist for a long time until a new consensus emerges as for example in the dispute about the width of the territorial sea'.[303] This happens because 'customary law has a built-in mechanism of

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[300] For example, in the *Fisheries case* the Court rejected the existence of a customary law regarding the maximum length for bay closing lines: '... although the ten-mile rule has been adopted by certain states, other states have adopted a different limit. Consequently, the ten-mile rule has not acquired the authority of a general rule of international law', *Fisheries case*, p. 131. See also the Case of the *Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide*, (Advisory Opinion of 28 May 1951), *ICJ Reports 1951*, p. 25 ('the examples of objections made to reservations appear to be too rare in international practice to have given rise to such a rule'); see also *North Sea Continental Shelf cases* where the ICJ concluded that the various examples 'are inconclusive and insufficient to bear the weight sought to be put upon them as evidence of such a settled practice manifested in such circumstances as would justify the inference that ... amounts to a mandatory rule of customary international law'; *North Sea Continental Shelf cases*, p. 45, para. 79; *Asylum case*, p. 277: See also *Rights of the US Nationals in Morocco case*, p. 200.

[301] H.Lauterpacht (1958), p. 369-370.

[302] Villiger suggested that 'the less States actively engage in practice and the more inconsistent the practice, the longer the formation of a customary rule will take', M.E.Villiger (1885), p. 24.

[303] P.Malanczuk (1997), p. 45. See also G.Danilenko (1988), p. 45: 'Modification of the existing law presupposes that the new practice constituting novel norms would, at least for a certain period of time, be in conflict with the already existing and operating customary law. In situations when some states support a novel rule, whereas other states maintain that the old customary law is still valid, it is very difficult to ascertain the state of general customary law on a given point'.

change',[304] which means that a rule of international law may change according to the needs of the states of the international community as expressed in their practice, their *opinio juris* and the acceptance of this practice by the other members of the international community.

Besides, as suggested by Tunkin 'the formulation of a customary rule occurs as a result of the intercourse of states, in which each state strives to consolidate as norms of conduct those rules which would correspond to its interests'[305] and therefore, divergent practice should be considered as an interim situation which might lead to the formation of customary law.

It may be inferred from the analysis presented above that at the particular stage the practice of these continental states which have chosen to apply a special regime to their outlying archipelagos is indicative of a shift in international law towards the formation of a rule of customary law. To use the illustrative example of de Visscher who likened the procedure for the development of customary law with the gradual formation of a road across vacant land,[306] it could be said that the practice of these continental states possessing an archipelago has certainly engraved a new 'path' in international law which if followed by other states could result in the establishment of a rule of international law regarding dependent midocean archipelagos. This view is enhanced by the fact that the rest of the elements of customary law have been found to be present in this practice, that is, states do have the belief that their practice is consistent with international law (*opinio juris*) and the rest of the states of the international community seem to have acquiesced in this practice.

This tendency in international law has also been observed by international scholars who have examined the case of dependent midocean archipelagos. Prescott has pointed out that 'the construction of such baselines is becoming a fairly common occurrence and this will be a trend difficult to reverse'.[307] Similarly, Kwiatkowska has

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[304] M.Akehurst (1974-5), p. 45. See also *Nicaragua case,* p. 109, para. 207 where the ICJ pronounced that '... reliance by a state on a novel right or an unprecedented exception to the principle might if shared in principle by other states, tend towards a modification of customary international law'.

[305] G.I.Tunkin (1974), p. 133. Cheng agreed but pointed out that this statement concerns mostly the 'formation' rather than the 'formulation' of rules of general international law; B.Cheng in R.St.J.McDonald & D.M.Johnston (eds) *(*1983), p. 535-8p. 533. See also Anzilloti as quoted in A.Cassese (2001), p. 160 'it is difficult for such a rule to emerge if one or more states is not faced with the opposition or protest of other states concerned, the rule gradually evolving out of this clash of interests'.

[306] C.De Visscher (1968), p. 154-5.

[307] J.R.V.Prescott, *The Maritime Political Boundaries of the World (*1985), p. 213. Referring to the case of the Xisha Islands he points out that for these islands to be surrounded by a single baseline 'it would

opined that the proliferation of claims by continental states upon their archipelagos might lead to the inclusion of these cases in the new customary law referring to the archipelagic regime.[308]

B. The content of the emerging customary rule of international law

Since it has been acknowledged that customary law is at the stage of emerging, the content of this rule of law should be ascertained. As a starting point, it is accepted that 'the content of the eventual customary rule will emerge from the uniform features of the international practice'.[309] This rule – as manifested in the practice of continental states in their outlying archipelagos and of 'failed' archipelagic states – consists in the application of straight baselines joining the salient points of the archipelago or parts of it and the treatment of the enclosed waters as internal waters of the state. The states engaged in this practice have not provided for the recognition of the right of innocent passage for third states' vessels within the enclosed waters[310] and thus, it seems that they have not accepted the potential application of article 8 (2) of the LOSC.[311]

However, the fact that dependent outlying archipelagos would have in their disposal a more favourable regime than the one prescribed in the LOSC for archipelagic states could be deemed as a paradox in international law. As observed by O'Connell 'the strange result would be that the specially privileged group of archipelagic states would be restricted by the concept of sealanes, while other

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be necessary to make an unusual interpretation of existing and proposed rules, which some countries, such as Ecuador and Australia, have already made'.

[308] B.Kwiatkowska (1991), p. 23. Rodgers similarly has noted – though particularly for the case of the Galapagos Islands - that since Ecuador was the first state to raise an archipelagic claims regarding its midocean archipelago, it can hardly be expected to abandon its position on this point'; P.E.J.Rodgers (1981), p. 165.

[309] I.M.L.DeSouza (1995), p. 528 ; M.E.Villiger (1985), p. 225.

[310] See, on the contrary, the policy of the UK and the recognition of the right of innocent passage in the internal waters of the Turks and Caicos Islands; see Chapter 3, p. 156.

[311] Article 8 reads as following: 'where the establishment of a straight baseline in accordance with the method set forth in article 7 has the effect of enclosing as internal waters areas which had not previously been considered as such, a right of innocent passage as provided in this Convention shall exist in those waters'. Churchill and Lowe observe that in the case of exercise of the right to draw straight baselines under customary law it is not clear whether the right of innocent passage could be preserved in the internal waters of that state. They refer to the *Fisheries case* which makes 'no reference to the preservation of rights of innocent passage in these circumstances'; R.R..Churchill & A.V.Lowe (1999), p. 61; see also T.L.McDorman, 'In the wake of the Polar Sea: Canadian jurisdiction and the northwest passage', 10 *MP* (1986), p. 247-9. It should, however, be noted that most states which have applied straight baselines to coasts deeply indented, cut into or fringed by islands (article 7 of the LOSC) have made no provision for the recognition of the right of innocent passage as prescribed in article 8 (2) of the LOSC.

archipelagos might be restricted only by that of innocent passage'.[312] It should be mentioned, however, that this result would occur only in the case where the archipelagic baselines enclose 'routes normally used for international navigation'. In the absence of such routes, archipelagic states would not have the obligation to designate archipelagic sea lanes. This may be inferred from article 53 para. 1 and 12 which provides that 'if the archipelagic state does not designate sea lanes or air routes, the right of archipelagic sea lanes passage may be exercised through the routes normally used for international navigation'. In the absence of such routes, no archipelagic sea lanes passage exists.[313] Third states' vessels may only exercise their right of innocent passage.

What is more, the explanation of this paradox is connected with the content of the emerging customary rule. As observed in Chapter 3 and illustrated in the analysis of state practice in the present Chapter,[314] states engaged in this practice have not pursued an analogical application of the archipelagic regime as prescribed by the LOSC for archipelagic states but consider the straight baselines applied to their archipelagos or to parts of them as an application of the straight baseline principle to groups of islands. Spain, for example, has chosen to unite not the whole archipelago of the Canary[315] or the Balearic Islands in a uniform baseline system, which would necessitate the enclosure of a broad maritime area, but has, instead, applied straight baselines only in specific parts of the archipelagos where the islands are located in close proximity to each other.[316] The same policy has been followed by Portugal which has united only the islands located at a close distance from each other and not the whole of the Madeira or Azores archipelagos.[317] France has applied straight baselines in archipelagos where the enclosure of maritime space is limited and the criterion of close relationship between the islands and the enclosed sea is met; this could be the case of the straight baselines system in Guadeloupe, where the baselines segments do not exceed double the breadth of the territorial sea (particularly, the

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[312] D.P.O'Connell (1982-4), p. 258. See also E.J.Molenaar, 'Navigational Rights and Freedoms in a European Regional Context' in D.Rothwell & S.Bateman, *Navigational Rights and Freedoms and the New Law of the Sea* (The Hague: M.Nijhoff, 2000), p. 24.

[313] M.Munavvar (1995), p. 171. However, it should be noted that the term 'routes normally used for international navigation' is quite vague and conflicting interpretations may be advanced; see B.Kwiatkowksa & E.R.Agoes (1991), p. 48.

[314] See Chapter 3, p. 178.

[315] See Chapter 5 for the discussions regarding the application of archipelagic baselines to the whole archipelago, p. 284-286.

[316] See Chapter 3, p. 150-152.

[317] For these archipelagos see Chapter 3, p. 152-154.

longest segment is 18.72 n.m.). In New Caledonia, France has applied a system of straight baselines joining together the small group of Loyalty Islands and has restrained from encircling the whole of the archipelago.[318] France similarly, has not tried to apply any straight baseline in French Polynesia, as this would require the enclosure of a vast maritime space and the drawing of long straight baselines.[319] Therefore, states have applied systems of straight baselines to archipelagos, the islands of which are located at close distances to each other enclosing thus a rather small maritime space.[320]

The state practice, as examined above, 're-opens' the discussion regarding the archipelagic concept on the basis of archipelagic proposals preceding the Third Conference on the Law of the Sea and the adoption of the archipelagic regime.[321] These proposals referred to smaller groups of islands, in which a straight baseline system could be applied joining the outermost points of the group leading to the internalisation or territorialisation of the enclosed waters. According to most of these proposals the distance between the islands of the archipelago should not exceed double the breadth of the territorial sea.[322]

This aspect of the archipelagic concept offers the states applying this system more in jurisdictional authority, but it is, at the same time, more limited with regard to its spatial application. The archipelagic regime of the LOSC 'expanded' and at the same time 'restricted' the archipelagic concept. Particularly, the archipelagic regime is to be applied to archipelagos broadly scattered in an extensive maritime area, such as the Philippines and Indonesia,[323] while at the same time it stipulates various restrictions on the sovereignty of the archipelagic state in the enclosed waters particularly with regard to navigation and overflight of foreign vessels and aircrafts

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[318] See Chapter 3, p. 157-159.
[319] See Chapter 5 on the practical application of such system in the French Polynesia, p. 286 *et seq...*
[320] As has been suggested above, this restrictive application of the archipelagic concept may also have been the reason for the lack of protest on behalf of the states of the international community; see *supra* p. 246.
[321] See *supra* Chapter 1, p. 17 *et seq.*.
[322] *Ibid.*
[323] The archipelagic baseline system surrounding the Indonesia archipelago measures 8,167 n.m. and encloses around 666.000 square n.m. of sea; US Department of State, *Limits in the Seas, No. 35: Straight Baselines: Indonesia* (Office of the Geographer, Bureau of Intelligence and Research, 1971), p. 8; The Philippines archipelago measures 1,152 n.m. in length and 688 n.m. in width. B.Kwiatkowska (1991), p. 4. The water area enclosed by archipelagic baselines amounts to 212,745 square miles; US Department of State, *Limits in the Seas, No. 33: Straight Baselines: Philippines* (Office of the Geographer, Bureau of Intelligence and Research, 1971), p. 9-10.

respectively.[324] The archipelagic regime of the LOSC was created and adopted to 'fit' the geographic particularities of the archipelagic states which participated in the Third Conference of the Law of the Sea and at the same time was formulated so as to safeguard maritime states' rights with regard to navigation passages through the archipelagic waters and particularly the straits of Indonesia and the Philippines, which constitute important navigation routes.[325]

State practice and the emerging customary law have 'redefined' the straight baseline principle advocating its application to groups of islands. This aspect of the archipelagic concept is in a way different from the archipelagic regime of the LOSC applied to archipelagic states. The archipelagic regime has a spatial gain whereas the application of the straight baseline principle in groups of islands as stemming from state practice has a jurisdictional asset.

However, a problem which cannot be addressed clearly from state practice concerns the issue of the conditions for the application of this regime and particularly the question of which groups of islands could be the beneficiaries of such regime. When the straight baseline principle was initially discussed in the various fora of international institutions, it referred to groups of islands, the distance between which did not exceed double the breadth of the territorial sea.[326] Apart from the cases of Sudan, Saudi Arabia and United Arab Emirates there is no such apparent restriction in the state practice discussed above.

However, it may be inferred from the analysis of state practice that states have been motivated by the principles enunciated by the ICJ in the *Fisheries case*.[327] The

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[324] See Chapter 1, p. 52-57.

[325] L.M.Alexander, *Navigational Restrictions within the New Law of the Sea Context: Geographical Implications for the US* (offshore Consultants Inc. Peace Dale, Rhode Island, December 1986, p. 290, 296-7, 354-6, 362); B.Kwaitkowska (1991), p. 5-6, 14-5. These authors note that both Indonesia and the Philippines contain straits of critical importance to the US military and commercial traffic (mentioned as 'choke points'). L.Lucchini & M.Voelckel (1990), p. 368-9.

[326] See Chapter 1, p. 18-21.

[327] The ICJ judgment in the *Fisheries case* had an important impact upon archipelagic claims. Despite the fact that the Court referred explicitly to the case of the Norwegian archipelago, many authors agreed that general principles could be deduced from the dictum of the Court on the basis of which a straight baseline system could analogically be applied in the case of outlying archipelagos. See C.F.Amerasinghe (1974), p. 54-6. Evensen observed that despite 'the absence of rules of a technically precise character, certain principles ... may be laid down' which according to the ICJ 'would provide courts with an adequate basis for their decisions': J.Evensen (1952), p. 623; see also J.Evensen (1958) p. 300. Evensen endorses all the principles laid down by the Court in his preparatory document on archipelagos for the First Conference on the Law of the Sea; H.W.Jayawardene (1990), p. 117: '... the decision itself has been interpreted as being by analogy also applicable to midocean archipelagos, on account of the fact that the statements thus made are couched in general terms expressing basic principles of international law in this field'.

importance of the dictum of the ICJ in the *Fisheries case* for the development of the law of the sea regarding the measurement of the territorial sea of archipelagos has been acknowledged by authors.[328] In this case, the ICJ, after having found that in principle the straight baseline rule was in conformity to international law, proceeded to enunciate principles on the basis of which it assessed the validity of the particular system applied by Norway to her peculiar coast. As noted by Evensen, the findings of the ICJ in this case 'have been held to express basic principles of international law of the sea' and 'have found their way into the 1982 Law of the Sea Convention, some passages taken almost *verbatim* from the Judgments'.[329] However, despite the proposals for an analogical application of these principles in the case of outlying archipelagos, the LOSC did not embody any provision regulating this case.[330] However, states have adopted, adapted and applied these principles in situations beyond those considered by the ICJ in the *Fisheries case*. These principles have inspired and motivated continental states in applying straight baselines in their outlying archipelagos and may be deemed to have shaped the conditions and determined the limits of the emerging customary rule based on this practice.

The rest of this subsection will demonstrate how these principles despite their vagueness may prescribe conditions for the application of straight baselines to groups of islands. The relevant principles are the following:

(a) The sea areas lying within the baselines should be sufficiently closely linked to the land domain to be subject to the regime of internal waters and there should be a 'close relationship existing between certain sea areas and the land formations which divide or surround them'.[331]

The criterion concerning the interdependence between the land and the surrounding waters is important for the differentiation between straight baselines applied in the case of group of islands and archipelagic baselines. In the former case it is important that the waters enclosed by the straight baselines are closely and tightly

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[328] See B.Kwiatkowska, 'The International Court of Justice and the Law of the Sea – Some Reflections', 11 *IJMCL* (1996), p. 526; J.M.Ruda, 'Some of the Contributions of the ICJ to the Development of International Law', 24 *NYU Journal of International Law and Politics* (1991-2), p. 58-61. See Chapter 1, p. 23-24.

[329] J.Evensen, 'The International Court of Justice Main Characteristics and Its Contribution to the Development of the Modern Law of Nations', 57 *Nordic Journal of International Law* (1988), p. 24.

[330] However, some of these principles have been reiterated in Part IV of the LOSC regarding archipelagic states; for, example article 47 (3) according to which archipelagic baselines shall not depart from the general configuration of the archipelago.

[331] *Fisheries case*, p. 133. See also article 7 (3) of the LOSC.

linked to the land domain of the islands so as to justify their characterisation as internal and the prohibition of passage of foreign vessels through these waters with the potential acceptance of the right of innocent passage; on the contrary, in the case of archipelagic waters, where the enclosure of maritime space is extensive,[332] the attribution of the right of innocent passage and perhaps of the right of archipelagic sea-lane passage to foreign vessels seems justified on the basis of the balance of interests between the archipelagic state and the international community.[333] As has been noted by Kwiatkowska the right of innocent passage offers an adequate solution for commercial fleets, whereas the archipelagic sea-lane passage accommodates the interests of military naval forces;[334] however, in waters so closely linked to the islands the latter right finds no justification as the protection of the security of the islands should outweigh the need for the mobility of warships.

A special mention should be, however, made to straits being formed between the islands of the archipelago and the existence of routes used for international navigation. During UNCLOS III, the discussions regarding the archipelagic regime were linked with the controversial question of straits used for international navigation and the right of transit passage.[335] The adoption of archipelagic sea lanes passage reflected the geographic realities of two important archipelagic states, Indonesia and the Philippines, which due to their strategic location enclose important straits used for international navigation.[336] The closure of these important straits from international navigation would force vessels to deviate from their course for thousands of nautical miles.[337] On the contrary, in small groups of islands, it is unlikely that the mobility of commercial/military vessels will be impaired, as these vessels may, without any undue burden, use routes of similar convenience around the group.[338] The deviation

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[332] See Demirali who argued that the archipelagic baseline system applied in Indonesia could not satisfy the criterion laid down by the ICJ in the *Fisheries case* concerning the waters being sufficiently linked to the land domain; A.Demirali, 'The Third UN Conference on the Law of the Sea and an Archipelagic Regime', 13 *San Diego Law Review* (1975-6), p. 751.

[333] For the maritime area covered by the Indonesian and Philippine archipelago see *supra* note 323.

[334] B.Kwiatkowska (1991), p. 28.

[335] See Chapter 1, p. 47 (note 153) and 54 (note 202).

[336] *Limits in the Seas*, No. 35 (on Indonesia), p. 8 and No. 33 (on Philippines), p. 9.

[337] Dale mentions that vessels would have to deviate 3,000 miles in order to avoid traversing the Indonesian archipelagic waters; see A.Dale (1978), p. 51.

[338] It is not suggested here that article 38 (1) of the LOSC, the so-called Messina exception is applicable in this case. This article provides that a regime of non-suspendable innocent passage (article 45) and not of transit passage will apply in straits formed between the mainland and an island under the conditions of article 38 (1). Indeed this would be applicable in the case of the strait formed between a mainland-type island and a small island, but not in straits formed between similarly sized islands; see L.Alexander, 'Exceptions to the Transit Passage Regime: Straits with Routes of 'Similar

will be marginal because of the small size of the group. What is more, in most instances the routes between the islands serve almost entirely the local communication between the islands and may not qualify as 'routes normally used for international navigation'.[339] As Lucchini and Voeckel point out 'il parait ... peu gênant pour la navigation internationale que des lignes de base droites réunissent les îles de l'archipel des Féroé, de celui des Galápagos ou de celui des Kerguelen'.[340] The same could be said for groups like the Loyalty Islands, Turks and Caicos, Svalbard archipelago.

In more practical terms, it could be suggested that where the waters enclosed by straight baselines had the legal status of territorial waters before the application of straight baselines, their internalisation seems more appropriate than in the case where these waters had the status of other zones where foreign vessels might have been enjoying navigational rights.[341] This observation reflects the criteria suggested before

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Convenience'', 18 (4) *ODIL* (1987), p. 480-481; B.B.Jia (1995), p. 141-3. What is stated here is that the archipelagic concept would justify the non-application of the transit passage in the case of a strait formed within an archipelagic formation. As has been mentioned above (Chapter 3, note 203) in the case of the archipelagic regime of Part IV of the LOSC, it is not necessary that all transit passage straits would be included in the archipelagic sea-lanes. With regard to the application of straight baselines on the basis of article 7, article 35 (a) provides that the application of straight baselines on the basis of article 7 would not necessarily preclude the application of the transit passage in straits used for international navigation which are enclosed by the baselines. The scope of the application of such provision is limited and no state has applied it in practice; see the analysis of this article in B.B.Jia (1995), p. 6-9.

[339] It is true that the term 'routes normally used for international navigation' is vague but it may be said that it is narrower than the term straits 'used for international navigation'; see the discussion in B.Kwiatkowska & E.R.Agoes (1991), p. 44-46. In contrast to 'straits used for international navigation' routes within archipelagic waters are further qualified by the adverb 'normally' which may presuppose 'actual' use of the route by international navigation and not just usefulness; S.N.Nandan & D.H.Anderson, 'Straits used for international navigation: a commentary on Part III of the UN Convention on the Law of the Sea 1982', 60 *BYIL* (1989), p. 168. There were attempts during UNCLOS I to qualify the use of straits by the addition of the word 'normally', 'customarily' and 'traditionally' during UNCLOS I J.A.DeYturriaga (1991), p. 12. – the ILC used the word 'normally' in its draft articles for UNCLOS I (*ILCYB*, 1956, Vol. 2, p. 273; 1955 vol. ii, p. 39) but this addition was rejected by the participating states (UNCLOS I, Off.Rec., Vol III, p. 100, para. 21; Vol. II p. 65); For the functional criteria for the determination of 'straits normally used for international navigation' which may be also used – to a degree - for the determination of 'routes normally used for international navigation' within archipelagic waters see M.Stelakatos-Loverdos, 'The Contribution of Channels to the definition of Straits Used for International Navigation', 13 IJMCL (1998), p. 76-80; B.B.Jia (1995), p. 34-58;

[340] L.Lucchini & M.Voelckel (1990), p. 381-2.

[341] The US Department of State referred to the criterion requiring waters to be sufficiently closely linked to the land domain (as it is stipulated in article 7 (1), (3)) as follows: 'In both of these descriptions, the implication is strong that the waters to be internalised would otherwise be part of the territorial sea. It is difficult to envision a situation where international waters (beyond 12 miles from the appropriate low-water line) could be somehow 'sufficiently closely linked' as to be subject to conversion in internal waters'; US Department of State, *Limits in the Seas, No. 124 Straight Baseline Claim: Honduras* (Office of the Oceans Affairs, Bureau of Oceans and International Environmental and Scientific Affairs, June 2001), p. 2-3.

UNCLOS III for the application of straight baselines to groups of islands according to which the distance between the islands of the archipelago should not exceed double the breadth of the territorial sea. This has not been verified in practice; states are indeed cautious not to enclose waters which are not closely linked to the islands but they have applied straight baselines even when the territorial seas of the islands do not overlap.

(b) 'The drawing of baselines must not depart to any appreciable extent from the general direction of the coast'.[342]

This principle enunciated by the ICJ in the *Fisheries case* is reflected in both article 7 on straight baselines and article 47 on archipelagic baselines.[343] O'Connell has observed that in the case of a midocean archipelago, where the relationship exists between the islands themselves, the 'general direction of the coast' is expressed in the outer periphery of the group.[344] On the basis of this observation, the provision of article 47 (3) of the LOSC has been criticised as redundant, as it is actually the outline of the outermost islands of the archipelago which determines its configuration.[345]

However, the rationale behind this criterion seems to be connected with criterion (a) discussed above regarding the close relationship between the islands and the intertwined waters. O'Connell stressed that 'the general direction of the coast notion is merely a cryptic way of expressing the intrinsic relationship between a line of natural features and the land to which they form a barrier'.[346] The principle of the general direction of the coast or of the archipelago focuses on the fact that there is an attraction between the islands of the archipelago and the associated waters and on the fact that the group of islands should be closely united so as to form a compact whole.

It might be true that in the case of the archipelagic regime the criterion of the general configuration of the archipelago may not have any practical significance, since there are other conditions which determine whether archipelagic baselines may be applied, such as the length of the baselines or the land-to-water ratio; however, in

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[342] *Fisheries case*, p. 133.
[343] Article 47 (3) prescribes that 'the drawing of such baselines shall not depart to any appreciable extent from the general configuration of the archipelago'.
[344] D.P.O'Connell (1971), p. 15.
[345] See R.D.Hogson & R.W.Smith (1976), p. 243-4. See also H.W.Jayawardene (1990), p. 149-150; M.Munavvar (1995), p. 132; R.R.Churchill & A.V.Lowe (1999), p. 124. Kwiatkowska and Agoes contend that the conditions of article 47 (3) is of minor practical importance 'since this requirement is implicit in the basic rule of article 47 (1) that the baselines join the outermost points of the outermost islands and features comprising the archipelago'; B.Kwiatkowska & E.R.Agoes (1991), p. 37.
[346] D.P.O'Connell (1971), p. 15.

the case of the customary application of the straight baseline principle to groups of islands, this criterion, despite its vagueness, may be useful in the determination of the coherence of the archipelago as a whole. The practical aspect of this criterion may be that exorbitantly long baselines will not conform to the application of the straight baseline principle, in view of the fact that in such a case the baselines will be likely to deviate from the outline of the archipelago as this is reflected in the mutual geographical attraction of the islands; in the same sense, long baselines are likely to lead to the enclosure of waters not closely linked to the land domain which according to the previous criterion would preclude their characterisation as internal.

(c) The existence of local interests, such as economic, environmental, historic or other, may justify the drawing of particular baselines.

In the *Fisheries case* the ICJ stressed the importance 'of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage' for the drawing of straight baselines.[347] This principle is reflected in article 7 (5) of the LOSC: 'where the method of straight baselines is applicable under paragraph 1, account may be taken in determining particular baselines, of economic interests peculiar to the region concerned, the reality and the importance of which are clearly evidenced by long usage'.[348]

Economic interests are particularly important for the case of outlying archipelagos.[349] This may be best demonstrated by the emphasis given by Denmark to the dependence of the Faroe Islands on the fishing resources of the waters defined by the baselines.[350] There are, however, other factors which could affect the drawing of straight baselines such as, for example, environmental or historic reasons. Indeed, the existence of historic rights was accepted by the ICJ as validating the drawing of baselines in particular sections of the Norwegian coast.[351]

The validity of straight baseline systems applied to groups of islands may be finally assessed on the basis of their being 'moderate and reasonable'. The ICJ used these criteria in the *Fisheries case* in order to assess the validity of one segment of the straight baseline system in the Lopphavet basin challenged by the UK as not

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[347] *Fisheries case*, p. 133.
[348] For an analysis of this condition see Chapter 2, p. 98-99.
[349] O'Connell argued that particularly this criterion is relevant in the case of midocean archipelagos in terms of the exploitation of the local marine resources; D.P.O'Connell (1971), p. 15.
[350] See *supra* p. 226-227.
[351] See in *Fisheries case* (p. 142) regarding the discussion on the legality of the baselines in the waters of the Lopphavet.

respecting the general direction of the coast. The Court after examining the various elements with regard to this baseline segment concluded that the drawing of the specific line 'appears to the Court to have been kept within the bounds of what is moderate and reasonable'.[352] The notions of 'moderation' and 'reasonableness' may be, thus, used as a test in cases where the consideration of the fore-mentioned criteria are inconclusive regarding the validity of a particular baseline segment. The length of the baselines should also be subject to a test of reasonableness.[353] However, moderation and reasonableness are very vague criteria and they should be examined only in close reference to any of the above criteria (a, b, c).[354]

All of the principles examined above do not envisage a mathematical method for the determination of the archipelagos entitled to apply the straight baseline principle or for the drawing of the particular baselines[355] and are thus characterised by a degree of uncertainty.[356] However, as pointed out by Evensen in 1959 the rules regarding the delimitation of the territorial sea of archipelagos should have a degree of flexibility so as to 'give reasonable weight to the many differences and peculiarities of each individual case'.[357] Flexibility does not render the application of straight baselines arbitrary but ensures that the variety of geographic particularities of archipelagos is taken into consideration when applying such a system.

4.5 CONCLUSION

The practice of continental states consisting in the application of straight baseline systems around their outlying archipelagos or parts of them cannot be considered as general enough so as to meet the conditions required for the establishment of a rule of customary international law as defined in article 38 of the Statute of the International Court of Justice: '*general* practice accepted as law'. However, the impact of this considerable practice upon the evolution of international law is important and the proliferation of similar claims by continental states in their

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[352] *Fisheries case,* p. 142.
[353] C.F.Amerasinghe (1974), p. 545.
[354] Fitzmaurice argued that reasonableness should be understood on the basis of the existence of special interests such as economic in the particular maritime space; G.Fitzmaurice (1953), p. 70.
[355] The ICJ stated that the condition regarding the general direction of the coast was devoid of any mathematical precision; *Fisheries case,* p. 141-2; see also Chapter 2, p. 96.
[356] See for example Johnson criticizing the dictum of the Court from this aspect: D.H.N.Johnson (1952), p. 162.
[357] J.Evensen (1958), p. 301.

midocean archipelagos could lead to the establishment of such a rule, particularly since the other constituent elements of international custom are present, that is, the states engaged in this practice consider their behaviour as consistent with international law (*opinio juris sive necessitatis*) and most of the states of the international community have not protested against or officially objected the established systems.

State practice and the emerging rule of customary law were found to concern closely-knit archipelagos where the distances between the islands are short and where there is a strong link between the enclosed waters and the land domain. In this respect, such application was deemed to reflect the principles enunciated by the ICJ in the *Fisheries case,* which seem to have inspired and motivated the practice of continental states in their outlying archipelagos. These principles have been analysed in the present chapter as stipulating the limits of the emerging rule and consequently the ambit of the application of straight baselines to groups of islands.

However, until generality of practice is attained and a general rule of international law concerning the baseline systems applied in dependent outlying archipelagos emerges, the practice of continental states may be deemed as valid under special customary rules stemming from and regulating each particular case according to the degree of acceptance of the particular system by the states of the international community. In this chapter, the establishment of such special customary rights for the case of the Galapagos Islands and the Faroe Islands was ascertained. These cases were treated as representative examples for the ascertainment of this type of rules particularly due to the application of straight baseline systems for a prolonged period of time and the strong evidence concerning their acceptance by other states. Similar cases could also be deemed as valid under special customary law in so far as other states have accepted them as such.

The existence of these special rules is important for the case of dependent midocean archipelagos. A generalisation of these rules stemming from the proliferation of various claims on the international level could lead to the emergence of a general rule of international law establishing a special regime for dependent outlying archipelagos.

Chapter 5: The application of a special archipelagic system to dependent 'broadly-scattered' archipelagos

5.1 INTRODUCTION

According to the conclusions reached in Chapter 4, the emerging general customary rule establishing a special regime consisting in the right of a state to draw straight baselines around the archipelago and to consider the enclosed waters as internal was found to concern closely-knit archipelagos, that is, groups of islands which cover a small maritime space and whose component geographical features are located at close distances.[1] It was argued in the previous Chapter that one of the conditions for the application of the straight baselines concept, as inferred from state practice, was that the waters enclosed by the straight baselines should be so closely linked to the land of the islands so as to justify their being considered as internal waters. In this sense, the application of straight baselines would normally enclose parts of the territorial sea of these islands and only marginal parts of the EEZ or, if the state has not adopted such a zone, parts of the high seas. In the case of broadly-scattered archipelagos, that is archipelagos spread out in a broad maritime space, the application of straight baselines would enclose wide areas of high seas lying between the islands. The emerging general customary rule seems inapplicable in this case, insofar as the application of a straight baseline system would lead to the internalisation of a large part of the high seas impinging thus upon the rights exercised therein by third states. The main criterion regarding the close link between the landmass of the islands and the surrounding sea cannot thus be met.

This Chapter explores the rights – if any – of dependent broadly-scattered archipelagos. The question addressed concerns whether the absence of any protective special regime for the case of broadly-scattered dependent archipelagos should be conceived as a *lacuna* in international law. In this respect, the first part of this chapter examines whether archipelagic states and broadly scattered archipelagos belonging to a continental state share the same interests and have the same needs so as to be treated in the same legal way through the recognition of a special regime for them or whether

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[1] See Chapter 4, p. 250 *et seq.*.

statehood could be considered as a sufficient reason for the distinctive treatment of archipelagic states in international law and subsequently for the exclusion of dependent outlying archipelagos from any special regime. The implications of the application of the archipelagic regime to archipelagic dependencies is examined, particularly with regard to the question of whether the application of a special regime concerning the measurement of the maritime zones of the archipelago as a whole and the consideration of the enclosed waters as archipelagic waters would pose a threat to the inclusive rights of the international community.

5.2 'Broadly-scattered' dependent archipelagos: a *lacuna* in international law

In the previous chapters treaty law and customary law were examined with regard to the treatment of archipelagos under international law. Treaty law specifically provides for the application of the archipelagic regime to archipelagic states and is silent with regard to the status of dependent outlying archipelagos.[2] General customary international law, which is in the process of emerging, was found to regulate – on the basis of state practice and according to the conclusions reached in Chapter 4 – solely 'closely-knit' groups of islands.[3] Neither conventional nor customary law provides for a special regime for dependent archipelagos which are broadly scattered in a large maritime space.

One may discern a *lacuna* in the law with regard to the treatment of these archipelagos.[4] This *lacuna* is, however, not a 'proper legal gap', as there is an applicable rule of law, namely the low-water rule, according to which the territorial sea would be measured from the low-water mark on the coasts of each individual island; this rule has, indeed, been applied in practice by states possessing such archipelagos. However, despite the fact that there is a rule of law providing for a solution for the determination of the baseline system applied in the case of broadly-scattered dependent outlying archipelagos, this law cannot be considered as satisfying.

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[2] See Chapter 1, p. 59-60.
[3] See Chapter 4, p. 250 *et seq.*.
[4] See J-F.Martin Ruiz 'Los espacios maritimos y el problema de su delimitacion en la posicion geopolitica del archipielago Canario', 9 *Revista Electronica de Geografia y Ciencas Sociales* (2005), p. 2.

This situation concerns a *lacuna de lege ferenda*, that is, a 'gap in what the law ought to provide'.[5]

Lacunae de lege ferenda and 'proper' *lacunae* in international law (if one accepts that such gaps exist and therefore that international law is incomplete[6]) require a different treatment with regard to their 'filling'. Whereas various suggestions have been advanced concerning the treatment of proper *lacunae,*[7] there is no actual need for 'filling' a *lacunae de lege ferenda*, as there is an applicable rule. 'Filling' a *lacuna de lege ferenda* necessitates a change in the applicable law according to the interests and the needs involved.[8] This change can only be realised through the international law-making process, that is, through the creation of conventional or customary law;[9] for example, the practice of states may pre-empt the issue and lead to the formation of a rule of customary law, which would fill the gap. Therefore, any suggestions for the application of a rule different from the existing law would be *de lege ferenda* and would compose solely an aspiration for change in the law.

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[5] D.Bodansky, 'Non Liquet and the Incompleteness of International Law' in L.B.deChazournes & P.Sands (eds), *International Law, the ICJ and Nuclear Weapons* (Cambridge: Cambridge University Press, 1999), p. 156. Siorat refers to this category of *lacunae* as 'deficiencies of law' ('*carence de droit*') according to which 'les règles en vigueur prévoient pour le cas d'espèce une solution qui n'est pas jugée satisfaisante par les Etats parties au litige' ; L.Siorat, *Le problème des lacunes en droit international* (Paris, 1959), p. 85 *et seq.*. Bobbio refers to these 'improper lacunae' as deriving 'from comparing the actual system with the ideal', N.Bobbio, *Teorria general del derecho* (1991), p. 240 as quoted in M.J.Aznar-Gomez, 'The 1996 Nuclear Weapons Advisory Opinion and non Liquet in International Law', 48 *ICLQ* (1999), p. 18

[6] One of the approaches concerning *lacunae* in international law denies their existence on the basis of the Lotus doctrine, which has been summarised in the following phrase 'whatever is not explicitly prohibited by international law is permitted', P.Weil, ''The Court Cannot Conclude Definitively' *Non Liquet* Revisited', 36 *Columbia Journal of Transnational law* (1998), p. 112; see the individual opinion of Judge Guillaume Advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons, ICJ Reports* 1996., p. 291, para. 9.

[7] See H.Thirlway (1989), p. 77 *et seq.* referring to the possibilities an international tribunal has when confronted with a *lacuna* in international law; see also Aznar-Gomez, p. 9-13, 15-17; for a debate on lacunae and non liquet see J.Stone, 'Non Liquet and the Function of Law in the International Community', 35 *BYIL* (1959), p. 124 et seq. and H.Lauterpacht, 'Some observations on the Prohibition of 'Non Liquet' and the Completeness of the Law', in *Symbolae Verzijl* (The Hague: Martinus Nijhoff, 1958), p.. 196 *et seq.*.

[8] Aznar-Gomez argues that real *lacunae* (defined by this author as gaps 'which would imply the effective absence of a legal rule due to a clear lack of regulation in an area not subject to the domestic jurisdiction of the states') 'can never be filled by the judge but only by those who create international legal rules'; M.J.Aznar-Gomez (1999), p. 15-6.

[9] In contrast to proper *lacunae*, *lacunae de lege ferenda* cannot be filled by an international tribunal; As stated by the ICJ '... the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislation has laid it down'; *Fisheries Jurisdiction case, ICJ Reports 1974*, p. 23-4, para. 53. Similarly, in the Nuclear Weapons advisory opinion the ICJ pointed out that in finding and applying the existent law it does take into consideration its scope and evolution, Advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons, ICJ Reports* 1996, p. 237, para. 18.

In the light of the above general comments, the following subsection will deal with two issues: first, it will examine whether the existing rule, namely the low-water mark, is, indeed, unsatisfactory for the case of dependent broadly-scattered archipelagos and second, it will suggest a more appropriate rule of law and assess its applicability. In the framework of the first question, it will be explored whether the reasons which led to the adoption of the archipelagic regime for archipelagic states are also valid for dependent outlying archipelagos or whether the element of statehood justifies the differentiation in the legal treatment between these two types of archipelagos.

5.2.1 The archipelagic concept and the element of statehood

(i) Legal definition of archipelagos according to the LOSC

The first remark that has to be made concerns the legal definition of archipelagos as embodied in article 46 (b) of the LOSC. According to this article 'archipelago means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely inter-related that such islands, waters and other natural features form an intrinsic geographical, economic and political entity or which historically have been regarded as such'. Starting from this definition which contains no mention to the political status of the archipelago, it can be argued that dependent outlying archipelagos may qualify as archipelagos in the legal sense.

In terms of geography, archipelagic states and dependent outlying archipelagos do present the exact same characteristics, namely they are composed of closely inter-related islands and other natural features.

The economic unity of an archipelago is indicated by the close interrelationship between the inhabitants of the islands and the resources of the interconnecting waters. The notion of the dependence of the archipelagic community upon the natural resources of the intervening waters is important for the identification of the archipelago as an economic unity.[10] Dependent outlying archipelagos may compose an economic unity in the same way an archipelagic state does.

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[10] C.F.Amerasinghe (1974), p. 565. Jayawardene contends, though, that the economic criterion is subjective in character as almost any archipelagic entity may point to economic reasons for unity. H.W.Jayawardene (1990), p. 139.

The political unity required by this provision presupposes that the islands of the archipelago belong to the same state.[11] It does not presuppose, however, that the archipelago should be a single state.[12] It can be either an archipelagic state or an archipelago belonging to a continental state.[13] The political unity refers to the administration of the archipelago, either as an independent administrative region or as a region administered as a part of a larger unit[14] according to the political system of the state.

Since the legal definition of an archipelago does not require that the archipelago constitutes a single state, both archipelagic states and midocean archipelagos can qualify as legal archipelagos, as long as they satisfy the 'entity' test as analysed above. Indeed, most midocean dependent archipelagos do compose single geographical, economic and political entities in the same way as archipelagos forming an independent state do.[15]

(ii) Reasons for the application of an archipelagic regime in terms of needs and interests and the criterion of statehood

Various reasons were suggested during UNCLOS III regarding the attribution of a special regime to outlying archipelagos.[16] These reasons concerned initially all archipelagos regardless of their political status. Geographical and historical reasons, economic interests, environmental and ecological considerations relate to all types of archipelagos regardless of their political status, as these reasons are linked with concerns stemming from the geographical realities of the archipelago and not from its political status.

It is the geography of the archipelago and the inequalities created by this geography that call for the application of a special regime.[17] The Australian delegate

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[11] C.F.Amerasinghe (1974), p. 557.
[12] M.Munavvar (1995), p. 114. Rodgers states, on the contrary, that 'no reference to 'mixed states' is contained in this definition, P.E.J.Rodgers (1981), p. 183.
[13] H.W. Jayawardene (1990), p. 139.
[14] L.L.Herman (1985), p. 180.
[15] M.Munavvar (1995), p. 136.
[16] See Chapter 1, p. 36-37.
[17] Geography plays the predominant role in the archipelagic concept, as it is the geography of the islands, which determine the archipelago: A.Dale (1978), p. 47; It is the special relationship between the land territory and the intervening waters that gives states an entitlement to exercise the same authority over the maritime area, as they do over their land: see P.E.J.Rodgers (1986), p. 117. J.W.Dellapenna (1970), p. 51. He stated that the geographic particularities of the archipelago as a close-

speaking on behalf of Papua New Guinea during UNCLOS III stressed that the 'geography of the island-state remained a potentially divisive influence' concluding that the archipelagic regime was a counterbalance for the problem caused by geographical particularities.[18]

Economic considerations in terms of exclusive exploitation of the natural resources of the waters of the archipelago were one of the primary incentives for the archipelagic concept. The unification of the archipelago through the recognition of the sovereignty of the state over the natural resources of the intervening waters was conceived as a means of protecting and safeguarding the interests of the inhabitants of the islands of the archipelago.[19] Indeed, during UNCLOS III, much of the argumentation in favour of the archipelagic regime was focused on the need of archipelagic states, which were developing states, to exploit their natural resources as a means of economic development. The attribution of the right of the exploitation of the natural resources of the sea and the sea-bed that surrounded the islands to the newly independent states was seen as a counterbalance to the overexploitation of the natural resources of these ex-colonies by colonial powers.[20]

Nevertheless, as we saw in Chapter 2, the economic basis of the archipelagic concept has nowadays lost its importance because of the adoption of the EEZ. Continental states may adopt EEZs extending 200 n.m. from the coast of each island; the overlapping of these zones would create a compact zone where the state will have exclusive sovereign rights over the natural resources of the waters. The overlapping of the continental shelves of the islands exceeding in a distance of 200 n.m. or more would offer the state sovereign rights over the natural resources of the seabed. In economic terms referring to the exploitation of the resources of the archipelago, the archipelagic regime offers only marginal advantage to the archipelagic state in contrast to the EEZ regime.[21]

Political considerations constitute also one of the factors supporting the archipelagic concept, in the sense that the attribution of a special regime to

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knit and compact group of islands lead to the arousal of serious security, commercial, fiscal and political difficulties for the state.

[18] UNCLOS III Off.Rec., Vol. II, Summary Records of the Meetings, 36th Meeting, para. 11, p. 260.

[19] M.Kusumaatmadja (1973), p. 166.

[20] It is true that most of those states, with the exemption of Indonesia and Philippines, which were emerging powers in the region of the Southeast Asia, were vulnerable micro states. M.Munavvar (1995), p. 30.

[21] For a comparison of the two regimes see Chapter 2, p. 62 *et seq.*.

archipelagos is regarded as a means of protecting and safeguarding political interests referring primarily to the security of the archipelago. However, security considerations are not necessarily related to the political status of the archipelago but stem primarily from its geographic realities, as the surveillance and protection of the waters of the archipelago is problematic due to its being penetrated and surrounded by water. Therefore, security problems either in the form of external security, such as defence against a foreign aggressor and protection of the territorial sovereignty of the state[22] or in the form of internal security such as trafficking, illegal immigration, smuggling, concern all types of archipelagos.[23] Given that it is more difficult to control areas of the sea than the territory of a state itself, archipelagic states as well as continental states possessing an archipelago must confront the dangers stemming from the geographical and geomorphologic realities of the archipelago.[24]

Ecological and environmental concerns played a major role in the arguments originally made by archipelagic states and states in possession of archipelagos during UNCLOS III.[25] All claimants emphasised the danger of pollution by accidents involving oil tankers or nuclear powered vessels.[26] The archipelagic ecosystem is indeed vulnerable to marine pollution.[27] The random configuration of the islands of

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[22] A state's attempts to protect the fragile security of the archipelago against external threats would be facilitated if foreign vessels, especially warships, did not have access at any time to the waters within the archipelago; C.F.Amerasinghe (1974), p. 557. The incapacity of the state to control a vulnerable area, that is the sea surrounding its land, could have severe consequences upon its national safety and territorial integrity.

[23] Archipelagos are susceptible to illegal actions, such as trafficking, illegal immigration, smuggling, committed by foreign vessels which may avoid prosecution by fleeing to the high seas inside the archipelago where the state has no jurisdiction; See J.R.Coquia (1962), p. 155; H.W.Jayawardene (1990), p. 108). See the statement by Senator Rios Perez in the Spanish Senate introducing the draft law concerning the application of straight baselines in the Canary Islands: 'Furthermore, this is not only an environmental demand: there has also been an increase in the illicit traffic of emigrants that has its own set of problems based on the type of boats they use which can lead to the loss of human life'; Cortes Generales, Diario de Sesiones del Senado, VII Leg. No. 125, p. 7741; the English translation is from 'Spanish Diplomatic and Parliamentary Practice', 9 *Span.YBIL* (2003), p. 127.

[24] D.W.Bowett (1979), p. 107: 'the security needs of the archipelago exist independently of its political status'.

[25] This issue was strongly raised by Ecuador in its attempt to extend the protective archipelagic regime to the Galapagos archipelago, 'which because of their exceptional wealth of flora and fauna ... deserve special treatment'; Official Records of the Third Conference on the Law of the Sea, Vol. XIII, Summary Records of Meetings, Plenary Meetings, 126th Meeting, para. 115. See also Vol. XVII, Plenary Meetings, Summary Records of meetings, 190th Meeting, para. 196.

[26] See Lee, 'An archipelagic claim for Papua-New Guinea' 2 *Melanesian law Journal* (1974), p. 103. See the statement by the Peruvian delegate concerning nuclear-powered ships and submarines; UNCLOS III Off.Rec., Vol. II, 37th Meeting, para. 21-24.

[27] Of great importance was this issue for coral archipelagos, that is groups of islands, which are based on the top of a coral formulation of the seabed, such as Fiji, Bahamas and the Maldives; see D.P.O'Connell (1971), p. 54. All archipelagos regardless of their political status are susceptible to the

the archipelago leads to the concentration of pollution sources caused by industrial or nuclear waste, marine accidents etc within the waters of the archipelago, as they are no channels for the polluted waters to wash away.[28] Pollution of the archipelagic marine environment could have a detrimental effect on the inhabitants of the islands and the local economy.[29] The unification of the archipelago with wider jurisdictional powers attributed to the state over the waters between the islands would facilitate the confrontation of dangers threatening the marine environment.[30]

It is evident that the pollution of the sea and the degradation of the marine environment is not an issue that affects solely archipelagic states. The vulnerability of archipelagos to marine pollution, which is due to their geographic and geophysical particularities, is irrelevant to the issue of statehood. The destruction of the marine environment affects primarily the population of the archipelago regardless of its political status. Thus, ecological preoccupations enhance the need for the establishment of a protective regime for all types of archipelagos.

Therefore, the criterion of statehood does not render the two categories of archipelagos, namely archipelagic states and dependent archipelagos, distinguishable in terms of needs and interests.

5.2.2 Statehood as a means of distinguishing archipelagos

The distinction adopted during UNCLOS III on the basis of the political status of archipelagos is certainly a political one.[31] As argued in the first chapter of the present thesis, statehood was chosen as a factor restricting the proliferation of claims.[32] What is more, the solution to the archipelagic problem was envisaged and proposed – due to the pressure exercised by developing states having formed an influential interest group

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destruction of the coral formations of some of the islands because of pollution; for example, Hawaii, French Polynesia, New Caledonia.

[28] A.Dale (1978), p. 48. See also R.P.Anand (1979), p. 242.

[29] Fishing, which is traditionally the main preoccupation of the archipelagic people and tourism, which constitutes, nowadays, a rapidly grown industry for archipelagos, will be severely affected by the degradation of the marine environment because of pollution.

[30] See the statement by Senator Rios Perez from the political party Coalicion Canarias introducing a law establishing straight baselines around the whole of the archipelago of the Canary Islands: '... The inhabitants of the archipelago ... watch with precaution and anguish as totally obsolete oil tankers, taking advantage of the anomalous situation characterising certain marine zones adjacent to the islands ... dump all sorts of substances into the sea with no control whatever...'; *Cortes Generales, Diario de Sesiones del Senado,* VII Leg. No. 125, p. 7741; the English translation is from 'Spanish Diplomatic and Parlimentary Practice', 9 *Span.YBIL* (2003), p. 127.

[31] D.W.Bowett (1979), p. 106.

[32] See Chapter 1, p. 42 *et seq.*.

– as a means of protecting the newly acquired independence of developing archipelagic states both in political and economic terms.[33] Moreover, as Lattion observes, there was a presumption during UNCLOS III that according a special regime to dependent archipelagic territories would be tantamount to benefiting the colonial power administering the archipelagos.[34]

It was, therefore, argued that the adoption of an archipelagic regime solely for archipelagic states was not arbitrary, as states such as Fiji, Philippines and Indonesia had different interests (eg. with respect to security or environmental control) from those midocean archipelagos which remain a dependent part of a sovereign state.[35] Syatauw particularly contended that the difference in the treatment of these categories is justified by the fact that dependent mid-ocean archipelagos' interests are 'determined and protected by the centre of power and authority on the mainland as it were a seaward extension of the mainland' while independent mid-ocean archipelagos bare the responsibility of their own affairs.[36]

It is true that most continental states possessing outlying archipelagos are developed states (particularly ex-colonial powers). In this respect, archipelagic territories may benefit from their dependency to the metropolis, given that they

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[33] This is evident in the speech of most states that supported the archipelagic regime, most of which participated in the highly active 'coalition' of the '77-non-alligned': See for example the statement of the Egyptian delegate pointing that the archipelagic regime 'reflected the legitimate desire of archipelagic states to reduce expenditure on national defence so that they could use the funds thus saved for national development'; UNCLOS III Off.Rec., Vol. II, 37th Meeting p. 268 para. 25. See also H.W.Jaywardene (1990), p. 111-2. Another example of the same view regarding the preferential treatment of developing states in the international law of the sea may be found in the *travaux préparatoires* of UNCLOS III regarding the adoption of the Exclusive Economic Zone. There were some arguments during UNCLOS III that extended rights over the national resources located in the Exclusive Economic Zones should be attributed solely to developing states, as these states confronted economic problems which could be solved through the attribution of preferential rights in the zone attached to their coast. This view was not accepted by the other participants of the Conference and finally the EEZ regime proposed by developing states was attributed to all states; see Division for Ocean Affairs and the Law of the Sea, Office of Legal Affairs, *The Law of the Sea: Exclusive Economic Zone. Legislative History of Articles 56, 58 and 59 of the UN Convention on the Law of the Sea* (UN Publ., 1992), p. 15, 28, 56.

[34] R.Lattion (1984), p. 113-4. Bowett similarly stated that the participants of UNCLOS III seemed 'reminiscent of the continuing empathy towards 'colonialism' in the sense that, by granting the dependent archipelago independence an archipelagic claim attaches to the archipelago'; D.W.Bowett (1979), p. 106.

[35] J.J.G.Syatauw (1973), p. 112. Syatuaw seems to suggest that the issue of statehood justifies the different legal status for geographically similar cases. He strangely argues also that 'the interests and views of independent coastal archipelagos eg Bahrain, Trinidad and Tobago differ from dependent coastal archipelagos, such as Bermuda'. He, therefore, concludes that the independence - dependence issue is more relevant and should prevail over the coastal – midocean distinction; *ibid*, p. 113.

[36] *Ibid*, p. 112.

receive annual economic aid or that the metropolitan state provides the infrastructure for the protection of the archipelago.

However, these contentions are not entirely true. Firstly, not all outlying archipelagos belong to developed continental states; there are also less developed or developing states which possess outlying archipelagos, such as Ecuador (Galapagos) or India (Andaman and Nicobar Islands). Secondly, in many cases the archipelago is a self-governing territory and has responsibility for economic issues or security matters. Bowett rightly observed that 'the needs of the people inhabiting a dependent archipelago may have to be met, in practice, by the economic resources of the archipelago without subvention or other large-scale economic support from the parent, mainland State'.[37] For example, the Faroe Islands, the Canary Islands, the Azores and Madeira Islands, the Cook Islands, the Netherlands Antilles, the Falkland Islands have full responsibility for financial and economic issues. Many of the French overseas territories (French Polynesia, Guadeloupe, New Caledonia etc) have also a wide degree of autonomy in administering local issues.

It should also be kept in mind that the archipelagic regime was conceived as a means of resolving problems created by the geographic particularities of archipelagos. Economic development in the sense of exploitation of the natural resources is an important aspect of the archipelagic regime but as has been mentioned above it has lost its significance because of the adoption of the EEZ. Nowadays, the archipelagic regime is more focused on the need to ensure that the archipelago is sufficiently protected in terms of security and environmental threats. Both of these aspects present economic implications as the protection of the archipelago against security dangers, such as illegal immigration, smuggling of goods etc, promotes its development whereas the protection of the marine environment ensures that two important aspects of the economy of the archipelago, namely fishing resources and tourism, are safeguarded.

In this sense, the main asset of the archipelagic regime is the fact that the state exercises sovereignty over the waters between the islands. This enables it to enact legislation and enforce it in these waters for the protection of the archipelago. The

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[37] E.D.Bowett (1979), p. 107. Hodgson rejects the relevance of the political status of the archipelago for delimitation purposes by saying that the revenues from the exploitation of the natural resources of the seabed of a dependency do not pass entirely to the administering developed state but mostly to the local population, R.D.Hodgson (1973), p. 8.

higher level of development of the archipelago cannot compensate for the absence of a protective legal regime in terms of jurisdiction in the waters between the islands. Economic prosperity and financial funds would be useless if the state does not have the right to use them for the protection of the archipelago. Therefore, it is irrelevant whether the archipelago is a developing independent state or whether it belongs to a developed continental states insofar as in the absence of a protective regime, the needs and interests of the archipelago cannot be sufficiently protected and safeguarded due to lack of jurisdiction in its waters.

It should also be emphasised that the archipelagic regime was conceived and promoted during UNCLOS III as a means of protecting the interests and needs of the people living in the archipelago.[38] In this sense, the beneficiaries of the archipelagic regime are the people inhabiting the islands. The economic, environmental and political benefits deriving from the application of the archipelagic regime would primarily be enjoyed by the archipelagic people and would contribute to the socio-economic development of the archipelago.

Moreover, the distinction between archipelagic states and dependent midocean archipelagos defies one of the basic principles of international law, namely sovereign equality of states.[39] Equal treatment of states in international law is a basic facet of the principle of equality of states and thus, the law should not disfavour certain states or create favourable conditions for certain others.[40] Therefore, law should treat the same facts in the same legal way whereas differential treatment would require justification based on specific circumstances.[41] However, as examined above, in the present case

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[38] M.Munavvar (1995), p. 30-33; R.Lattion (1984), p. 114 ; M.Kusumaatmadja in L.M.Alexander (1973), p. 174; archipelagic states during UNCLOS III referred primarily to the need for a special protective regime for the benefit of the population of the archipelago; see Indonesia, UNCLOS III Off.Rec., Vol. I, p. 187; Fiji, para. 44-50.

[39] See GA Res. 2625 (XXV) of 24th October 1970 on Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among states in accordance with the Charter of the United Nations (the declaration may be found at www.un.org/documents/ga/res/25/ares25.htm; I.Brownlie (2003), 118, 287. A.Cassesse (2001), p. 52-3; M.N.Shaw (2003), p.192-3.

[40] V.Pechota, 'Equality: Political Justice in an Unequal World' in R.S.J.MacDonald & D.M.Johnston (eds), *The Structure and Process of International Law* (The Hague: Martinus Nijhof Publishers, 1983), p. 454.

[41] A.Cassese (2001), p. 52. V.Pechota in R.S.J.McDonald & D.M.Johnston (eds) (1983), p. 459. There is also the view that 'discrimination by way of granting specially favourable treatment to developing countries has come to be seen as a means whereby developed countries can assist developing countries in their efforts to make economic progress' (positive discrimination in favour of developing states): R.Jennings & A.Watts, *Oppenheim's International Law* (1992), p. 378, Dinh, Daillier and Pellet refer to this concept as 'inégalité compensatrice' ; N.Q.Dinh, P.Daillier, A.Pellet (1980), p. 365. This view might have been in the mind of the negotiators during UNCLOS but has no legal or political

the factual circumstances do not justify a differential treatment, in so far as the interests and needs of archipelagos are identical regardless of their political status.[42] Therefore, geographical formations sharing the same economic, environmental and political interests, should be attributed the same legal protective regime.

This 'politically-oriented' distinction in the legal treatment of archipelagos impairs also the sovereignty of the continental states possessing an archipelago. The impact of such a distinction on state sovereignty was stressed by France during UNCLOS III. Specifically, the French delegate stated that 'some proposals, contrary to existing international law, were aimed at establishing a distinction between the sovereignty exercised by the State over islands and that exercised over parts of a continent. Such an approach would be a legal monstrosity because it would lead to a division of the sovereignty of the state'.[43]

It may be concluded, that the element of statehood as a differentiating element for the application of a special protective regime between archipelagos is arbitrary.[44] Dependent midocean archipelagos do share the same interests and needs as archipelagic states and should be able to benefit from the same protective regime.[45]

5.2.3 Self-governing and non-self-governing archipelagic territories as 'quasi' archipelagic states

Non-self-governing archipelagic territories are a remnant of the colonial era and were subject to United Nations Trusteeship Agreements. Some of them are still listed by the General Assembly as Non-Self-Governing Territories whereas others decided

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justification as broadly-scattered dependent archipelagos are in all cases developing territories and their need to development is quite strong, as they suffer from the geographical disadvantages of being scattered in a wide maritime space.

[42] The French delegate rejected the differentiation in the treatment of archipelagic states and archipelagos forming part of a continental state stating that 'it would also be thoroughly objectionable because it would threaten the sovereignty of some states while extending that of others over large portions of the sea. The arbitrariness of such a distinction was obvious; it was quite without any legal basis and would only heighten certain geographical inequalities'; UNCLOS III Off.Rec., Vol. II, 36th Meeting, p. 263, para. 45.

[43] *Ibid*; the same view was advanced by the Ecuadorian delegate: *ibid*, 37th Meeting, p. 267, para. 17; Spain expressed the view that a distinction between dependent archipelagos and archipelagic states ' would seriously penalise' continental states in possession of an archipelago; *ibid*, 37th Meeting, p. 270, para. 42. The Portuguese delegate also stated that the application of a different regime to dependent archipelago 'would mean that the archipelagic part of the territory of mixed states would be regarded as second class territory', 37th Meeting, p. 266, para. 5.

[44] E.D.Brown (1994), p. 108; H.P.Rajan (1986), p. 147. M.A.Saenz de Santa Maria (1994), p. 209 and Spanish authorities cited therein (note 24).

[45] V.S.Mani (1980), p. 104.

not to opt out for independence but to be incorporated in the state administering them in most cases enjoying a self-governing status.[46] The common element in most cases is that those territories despite some degree of self-governance are dependent upon the central government.

In the list of non-self-governing territories prepared by the General Assembly, the following archipelagos feature: Anguilla (Overseas territory of the UK), British Virgin Islands (Overseas territory of the UK), Cayman Islands (Overseas territory of the UK), Falkland Islands (Malvinas) (Overseas territory of the UK, sovereignty disputed by Argentina), Turks and Caicos Islands (Overseas territory of the UK), US Virgin Islands (organized, unincorporated territory of the US), American Samoa (unincorporated and unorganized territory of the US), New Caledonia (*sui generis* collectivity of France), Pitcairn Islands (Overseas territory of the UK), Tokelau (self-administering territory of New Zealand[47]).[48] Other non-self governing territories, which do not appear in the above list, or self governing territories or territories with similar status, are Cocos (Keeling) Islands (a non-self governing territory of Australia), Cook Islands (self-governing territory in free association with New Zealand), French Polynesia (Overseas Territory of France), Northern Mariana Islands (Commonwealth in political union with the US).[49]

These archipelagic territories share many characteristics, among which the fact that they are inhabited mostly by indigenous people, which have the citizenship of the main state but at the same time have a tradition and culture of their own and try to preserve them through mechanisms provided by the United Nations, such as the recognition of indigenous rights. In all these cases, the 'archipelagic populations' regard the sea as part of their tradition and they have in some instances raised claims in the waters of the archipelagos.[50]

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[46] The political statuses of previous trust territories which did not acquire their independence vary from composing an overseas territory of the state, such as in the case of French Polynesia, to being in free association with their previous colonial power, as is the case of the Cook Islands (New Zealand). See M.N.Shaw (2003), p. 201-2.

[47] A UN sponsored referendum on self governance in October 2007 did not produce the two-thirds majority vote necessary for changing the political status of Tokelau to that of free association with New Zealand.

[48] As appear in http://www.un.org/Depts/dpi/decolonization/trust3.htm.

[49] The data regarding the status of these territories have been found in https://www.cia.gov/library/publications/the-world-factbook/.

[50] See for example the case of Hawaii, Chapter 3, p. 169 *et seq.*. See also *infra* the cases of the Canary Islands and French Polynesia.

The distinction among archipelagos on the basis of their political status is particularly detrimental to these self-governing archipelagic territories.[51] All of today's archipelagic states acquired their independence from the power administering them during the decolonisation period. However, many archipelagic dependencies have chosen not to become independent but to maintain their bond with the ex-colonial power. Some of them are still in the process of considering their options or for political reasons have put a stop to the independence process. It is, indeed, true that these states would be considered as archipelagic states and apply the archipelagic regime upon the declaration of their independence. However, the declaration of independence does not alter the elements upon which the archipelagic concept is based and particularly the inadequacies created by the geographic realities of the archipelago.

Brown, stressing that the element of statehood for the differentiation of archipelagos is quite arbitrary, refers to the case of Vanuatu, presently an independent archipelagic state. Before its independence in 1980, Vanuatu was administered by France and the UK as the condominium of the New Hebrides. In 1979 Vanuatu could not be regarded as an archipelagic state and did not have the right to draw archipelagic baselines for the delimitation of its maritime zones due to its political connection to France and the UK. A year later, Vanuatu attained this right on its becoming independent. The geographic, economic and political reasons for the unification of the scattered islands were the same. The acquisition of its independence did not alter the need of the inhabitants of these islands to have their archipelago united.

Another example concerns two of the UN trust territories of the Pacific under the administration of the USA. While Marshall Islands opted for their independence (signing, however, a Compact of Free Association with the USA) and have thus claimed archipelagic status,[52] Northern Mariana Islands decided not seek independence but to remain in political union with the USA as a commonwealth. Due

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[51] Lattion argues that the lack of a protective regime for dependent archipelagic territories was made without concern for the welfare of the indigenous population of the archipelagos, R.Lattion (1984), p. 114.

[52] See the Marine Zones (Declaration) Act 1984 (An Act To make provision in respect of the Internal Waters, the Archipelagic Waters, the Territorial Sea, the Exclusive Economic Zone and the contiguous Zone of the Republic) found at http://www.un.org/Depts/los/LEGISLATION ANDTREATIES/PDFFILES/MHL_1984_Act.pdf.

to its dependent status the Commonwealth of the Northern Mariana Islands cannot claim archipelagic status.

Non-self or self-governing archipelagic dependencies may be considered as 'nascent' archipelagic states. Indeed the only impediment to their being considered as archipelagic states according to the LOSC and to their claiming an archipelagic status is the declaration of their independence. What is more, many of these archipelagic territories are still contemplating independence and in many cases referenda have been proclaimed for deciding the status preferred by the people of these territories. The transition into independence will not change the actual and present need to have their archipelago united and to exercise effective control over its waters. Moreover, should these states choose to remain part of the metropolis, they should not be penalised by not acquiring archipelagic status and by being deprived of the legal regime for the effective protection of their archipelagos.

In resolution III annexed to the LOSC it was provided with regard to the rights and interests of dependent territories that 'in the case of a territory whose people have not attained full independence or other self-governing status recognised by the UN, or a territory under colonial domination, provisions concerning rights and interests under the Convention shall be implemented for the benefit of the people of the territory with a view to promoting their well-being and development'.[53] Despite the fact that the rights and interests of people inhabiting dependent territories were recognised and safeguarded, the archipelagic regime which would mostly benefit the 'archipelagic population' in terms of economic and political development is inapplicable.

Another relevant provision of the LOSC seems to be article 305. This article referring to the signature of the Convention provides that the Convention will be open for signature by 'all self-governing associated states which have chosen that status in an act of self-determination supervised and approved by the UN in accordance with GA resolution 1514 (XV) and which have competence over the matters governed by this Convention, including the competence to enter into treaties in respect of those matters'. According to Lattion, it seems logical that states which were given the right

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[53] *The Law of the Sea: Official text of the UN Convention of the Law of the Sea with annexes and index; Final Act of the Third UN Conference on the Law of the Sea; Introductory Material on the Convention and the Conference* (UN Publication) (London, Croom Helm, 1983), p. 33.

to sign the Convention should also be able to benefit fully from the provisions of the LOSC, including the special protective regime attributed to archipelagic states.[54]

Indeed, since the 'special' status of these territories has been recognised by both Resolution III annexed to the LOSC and article 305, they should be given the right to apply the archipelagic regime so as to protect and safeguard their interests as 'nascent archipelagic states'.

5.2.4 An answer to the 'proliferation of claims' argument: Is the archipelagic regime – if applied to broadly-scattered dependent archipelagos – a threat to other states?

It was argued above that the attribution of the archipelagic regime to widely-scattered archipelagos would cover the gap presented in international law with regard to the treatment of archipelagos and would satisfy the special needs and interests of these archipelagos. However, most of the objections against such archipelagic claims have been based on their potential threat to third states' interests and rights traditionally exercised in the waters defined by the archipelagic baselines. Indeed, the fears of third states for a proliferation of claims and for the subsequent curtailment of their maritime rights led to the exclusion of dependent midocean archipelagos from the application of an archipelagic regime.

It is true that the application of an archipelagic regime to broadly-scattered dependent archipelagos would transfer maritime space, which was previously considered part of the high seas or the EEZ, into the sovereignty of a continental state. In such a case, a clash of rights and interests would occur; the application of the archipelagic regime would satisfy the interests of archipelagos forming part of a continental state as they were analysed above, but at the same time it would restrict the rights and freedoms exercised by third states in the waters enclosed by the archipelagic baselines. Therefore, it should be examined whether the application of such a regime would compose a threat to the rights and interest of other states or whether these rights are sufficiently safeguarded in the regime of archipelagic waters as prescribed by the LOSC.[55]

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[54] R.Lattion (1984), p. 116.

[55] Judge Alvarez in his individual opinion in the *Fisheries case* argued that 'each state may therefore determine the extent of its territorial sea and the way it is to be reckoned, provided it does so in a reasonable manner, that it is capable of exercising supervision over the zone in question and of carrying

To begin with, it should be pointed out, as Munavvar observes, that 'due to the geographic situation of archipelagos, these waters are used by archipelagic states and other states with archipelagos more than other states do, for various marine activities'.[56] This is true but judging from the opposition raised by third states against the archipelagic regime *per se* but also against the expansion of the archipelagic regime to dependent midocean archipelagos it could be said that third states do have interests in the waters of archipelagos, which they will want to preserve. In particular, the possible protests of third states regarding the impairment of their rights by the application of the archipelagic regime in dependent midocean archipelagos would concern primarily the impediment of the freedom of navigation, which affects all states, and secondly the curtailment of some rights exercised traditionally by neighbouring states.

A. Freedom of navigation and overflight and other uses of sea exercised in the high seas

The argument used by maritime powers since the conception of the archipelagic idea and the rise of archipelagic claims was that the extension of state sovereignty over areas of the high seas would be an infringement upon the freedoms enjoyed therein by all the states of the international community particularly with regard to navigation and overflight.

However, the opposition raised by maritime powers against archipelagic claims led to a compromise during UNCLOS III with regard to navigational and overflight rights within archipelagic waters.[57] The LOSC prescribes that all states enjoy the right of innocent passage in the archipelagic waters and the right of archipelagic sea-lane passage in routes specifically designated by the archipelagic state.[58]

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out the duties imposed by international law, that it does not infringe rights acquired by other states, that it does no harm to general interests and does not constitute an *abus de droit'; Fisheries case, ICJ Reports 1951*, p. 150.

[56] M.Munavvar (1995), p. 38.

[57] See Kwiatkowska & E.R.Agoes (1991), p. 53-9. For the arguments of maritime powers see M.Munavvar (1995), p. 38-44; H.W.Jayawardene (1990), p. 112-113; R.P.Anand (1979), p. 244-246; see also Chapter 1, p. 52 *et seq.*.

[58] Articles 52-3 of thte LOSC. The archipelagic sea-lane passage is considered to be one of the most serious concessions made by archipelagic states; see C.S.N.Narokobi in J.M.Van Dyke, L.M.Alexander & J.R.Morgan (eds), 1988), p. 232; Kwiatkowska & A.R.Agoes (1991), p. 56; they argue that this serious concession was part of a 'package deal' connected with the deep sea-bed regime and aiming at convincing the US to sign the Convention.

The application of the archipelagic regime in the case of widely-spread dependent midocean archipelagos under the conditions prescribed in the LOSC would safeguard sufficiently the navigational rights of third states within the waters enclosed by archipelagic baselines. The commercial interests of third states for their merchant vessels are ensured by the recognition of innocent passage in archipelagic waters.[59] The mobility of the navy of third states is also safeguarded through the archipelagic sea-lanes where submarines may pass submerged and aircrafts may exercise a right of overflight. Any other restrictions upon the mobility of third states' vessels and aircrafts, such as the performance of naval manoeuvres by military vessels or military exercises, are fairly justified by the need of the archipelago to protect a sensitive maritime space in terms of security reasons. It may be argued that in this clash of interests between the protection of an economically, politically and environmentally vulnerable maritime space and the exercise of the freedom of navigation especially for warships, the former should be given priority in international law as the latter may be exercised in other maritime space – i.e. in the high seas - without a burden borne by the interested states.

Therefore, the rights of navigation of third states are indeed restricted in the archipelagic waters but not in such a degree so as to create problems in the mobility of their fleet – either military or commercial – and a curtailment of their national interests.

Lastly, some other freedoms exercised by states in the high seas will be limited, such as fishing rights or exploitation of the natural resources in general and the laying of submarine cables and pipelines. With regard to the former, it is suggested that with the adoption of the EEZ and the exercise of exclusive sovereign rights upon the natural living resources the rights of third states would be anyway limited in the maritime space extending 200 n.m. from the coast of each island and therefore, the application of an archipelagic regime would not change much in this regard, perhaps only in the case where the EEZs generated from the islands do not overlap.[60] The same concerns also the non-living resources of the sea-bed since the continental shelf

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[59] Kwiatkowska & Agoes characteristically mention that 'the right of innocent passage would be perfectly adequate for commercial navigation and the non-applicability of this right to overflight never hindered civil aviation'; B.Kwiatkowska & E.R.Agoes (1991), p. 40.

[60] See Chapter 2, p. 72 *et seq.* for a comparison between the benefits of the two different regimes – EEZ and archipelagic regime.

extending 200 nm (or more in the cases provided for in article 76 of the LOSC) would cover the maritime area inside the archipelago.

A problem related to this issue could be that the application of the archipelagic baselines would 'push' the external limit of the maritime zones seaward extending the coastal jurisdiction of the state. However, this extension is only to be marginal with comparison to the maritime zones measured from the coast of each island in the outline of the archipelago; Jayawardene finds that 'the only effective difference would be that the outer perimeter of the economic zone would be demarcated by straight lines rather than by curves, whose exact location on charts would be harder to ascertain'.[61] Additionally, the application of 'archipelagic' straight baselines should not be seen as a way of 'creeping' jurisdiction[62] but as a means of protecting the archipelago. Indeed, what is important in the archipelagic concept is the integration of the internal waters of the archipelago in a 'special' uniform regime; however, the protection of these waters cannot be safeguarded without their encirclement by a uniform maritime zone, namely the territorial sea, which offers the archipelago sufficient protection.

With regard to the laying of submarine cables and pipelines, these rights of third states are subject to the previous consent of the archipelagic state with the only exception of existing submarine cables, which the archipelagic state is obliged to respect.[63] This would be a legitimate restriction of the rights of third states in the waters of an archipelago justified by the need of the archipelago to protect its interests. Besides, third states may lay cables and pipelines on the seabed outside the archipelagic waters or if this is too burdensome or much more expensive they can always negotiate a bilateral agreement with the state administering the archipelago for the emplacement of cables etc within archipelagic waters.

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[61] H.W.Jayawardene (1990), p. 154.

[62] Reisman and Westerman have severely criticised straight baselines by alleging that 'straight baselines now further erode international surface and subsurface use by either territorialisation or even internalisation of waters in the Exclusive Economic Zone, an area in which such international use is supposed to have been reserved', W.M.Reisman & G.S.Westerman (1992), p. 196. For a reply to this criticism see Conclusions, p. 305-308.

[63] Article 51 (2) prescribes the following: 'An archipelagic State shall respect existing submarine cables laid by other states and passing through its waters without making a landfall. An archipelagic state shall permit the maintenance and replacement of such cables upon receiving due notice of their location and the intention to repair or replace them'.

Lastly, the exclusion of dependent outlying archipelagos from the archipelagic regime was justified as a means of protecting the freedom of the high seas by restricting the application of the archipelagic regime to objectively identified claimants and avoiding a proliferation of claims.[64] Bowett indeed acknowledged that the only advantage from the restriction of the application of the archipelagic regime to archipelagic states is 'that it limits the number of potential archipelagic claims'.[65] He contradicted, however, this idea by stating that the application of the archipelagic regime as prescribed in the LOSC is indeed restricted by the imposition of the conditions stipulated in article 47 regarding the length of the archipelagic baselines or the water-to-land ratio.[66] What is more, though vague the definition of an archipelago could restrict the cases in which the archipelagic regime would be applicable. Besides, the number of dependent broadly-scattered archipelagos which could benefit from the application of the archipelagic regime is limited and therefore, the application is not open-ended.

Therefore, the rights and interests of third states are satisfactorily safeguarded both through the recognition of specific rights exercised within archipelagic waters as well as through the imposition of specific conditions for the application of such a regime.

B. Rights of states neighbouring an archipelago

During UNCLOS III the most fervent opposition to the application of the archipelagic regime to dependent archipelagos came from states neighbouring such an archipelago.[67] This shows that these states consider that the archipelagic regime in the waters neighbouring theirs would be an imminent threat to their interests.

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[64] See the statement of the delegate of Japan, UNCLOS III Off.Rec., Vol. II, 36th Meeting, p. 261, para. 15.

[65] D.W.Bowett (1979), p. 107.

[66] *Ibid.*

[67] See Chapter 1, p. 42. Turkey argued that the application of an archipelagic regime in the Aegean archipelago would nullify its economic rights with regard to fishing and the continental shelf and her rights to take measures for its own defence; UNCLOS III Off.Rec., Vol. II, 37th Meeting, p. 272, para. 72. Pakistan referred to the hardship created for the states bordering an enclosed or semi-enclosed sea from the application of the archipelagic regime in an archipelago belonging to one of the states in the area; *Ibid*, 37th Session, p. 270, para. 51. Malaysia despite supporting the archipelagic concept for archipelagic states noted that 'due account should be taken of the rights and interests of neighbouring States affected by the archipelagic claim', Vol. II, Summary Records of Meetings, 37th Meeting, p. 270; see similarly Thailand, 36th Meeting, p. 265 and Singapore (37th Meeting, p. 268, para. 29).

However, the archipelagic regime as prescribed in the Convention has taken into consideration the arguments and concerns of states neighbouring an archipelago. Initially, the interests of neighbouring states with regard to navigational issues are satisfied by the recognition of the right of innocent passage and archipelagic sea-lane passage within archipelagic waters as enjoyed by all the states of the international community. Their particularly resource-oriented interests have also been provided for in the Convention where it is prescribed that 'an archipelagic state shall respect existing agreements with other States and shall recognise traditional fishing rights and other legitimate activities of the immediately adjacent neighbouring states in certain areas falling within archipelagic waters'.[68]

Article 47 (6) refers also to the rights of neighbouring states stipulating that 'if a part of the archipelagic waters of an archipelagic State lies between two parts of an immediately adjacent neighbouring State, existing rights and all other legitimate interests which the later State has traditionally exercised in such waters and all rights stipulated by agreement between those states shall continue and be respected'.[69] Similarly, article 47 (5) prescribes with regard to the drawing of archipelagic baselines that the system of such baselines 'shall not be applied by an archipelagic State in such a manner as to cut off from the high seas or the exclusive economic zone the territorial sea of another state'.

These articles aim at safeguarding and protecting the interests of the immediate neighbouring states.[70] Most importantly article 51 creates an obligation on behalf of the archipelagic state to recognise and respect the rights exercised by the neighbouring states in its waters with regard to fishing traditionally performed in these waters and other legitimate activities. Furthermore, it stipulates that the exercise of these rights and activities will be regulated by bilateral agreements concluded at the request of any of the states concerned. It is argued that there is some ambiguity with regard to some terms used in this article particularly the meaning of 'traditional fishing rights' or of 'legitimate activities' or the specification of which states could be considered as

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[68] Article 51 (1) of the LOSC.
[69] This article concerns primarily the case of Malaysia as the maritime route between East and West Malaysia would be enclosed by Indonesian archipelagic waters.
[70] All these articles were a result of negotiations between Indonesia and its immediate neighbouring states and of a consequent compromise; see the statement of the Indonesia delegate in Vol. II, 36th Meeting, p. 260, para. 5

'immediately adjacent neighbouring' states.[71] However, since the terms and conditions for the exercise of these rights are to be regulated through the conclusion of bilateral agreements, this leaves a degree of flexibility to both states to claim or accept respectively the rights, which they consider as best safeguarding their interests. For example, the Jakarta Treaty signed between Indonesia and Malaysia in 1982 goes beyond the requirements of the LOSC and recognises previously existing rights of Malaysia not only in the archipelagic waters but also in the Indonesian territorial sea and air space.[72] Moreover, the Jakarta Treaty covers issues of traditional fishing, the emplacement of submarine cables and pipelines, search and rescue operations and marine scientific research and provides for the access and communication of states and civil aircrafts and for the interests of Malaysia relating to the promotion and maintenance of law and order.[73]

It seems, therefore, that the interests of neighbouring states are accommodated and respected to the degree that they do not prejudice the application of the archipelagic regime. Through this accommodation of interests the Convention succeeded in having the archipelagic regime accepted by states neighbouring archipelagic states and as can be judged from the example of Indonesia-Malaysia no problems have arisen between these states as long as rights are mutually respected.

5.2.5 Application of the archipelagic regime to archipelagic dependencies: potential and implications

According to the above analysis, archipelagic states and broadly-scattered dependent archipelagos should have been accorded the same treatment in international law. Insofar as the archipelagic regime as prescribed in the LOSC has been accepted – despite its deficiencies – as the regime applicable to archipelagic states and it is well-argued that it has acquired the status of customary international law,[74] an analogical application of this regime should be adopted for broadly-scattered dependent archipelagos on the basis of the conditions prescribed in Part IV of the LOSC.

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[71] M.Munavvar (1995), p. 160.
[72] *Ibid*, p. 162. See Jakarta Treaty of 25 February 198.
[73] Article 2 of the Jakarta Treaty.
[74] See Chapter 4, p. 180.

Cases where the conditions of article 46-7 of the LOSC are met and the archipelagic regime may validly be applied include New Caledonia,[75] Cayman Islands,[76] Cocos (Keeling) Islands, French Polynesia. The number of dependent broadly-scattered archipelagos, to which the archipelagic regime may be analogically applied, is small and thus such application will not be open-ended nor will lead to a proliferation of claims. Furthermore, the conditions posed by article 47 (1-2) will safeguard the application of the archipelagic regime solely to compact groups of islands.

1. Canary Islands

As analysed in Chapter 3, Spain has applied straight baselines in the eastern side of the archipelago joining in a common straight baseline system the islands of Alegranza, Lanzarote and Fuerteventura. Act No. 15 of 20 February 1978[77] provides that 'in the case of archipelagos, the outer limit of the economic zone shall be measured from straight baselines joining the outermost points of the islands and islets forming the archipelagos, so that the resulting perimeter conforms to the general

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[75] New Caledonia consists of the main island of New Caledonia (one of the largest in the Pacific Ocean), the Iles Loyauté, which are located in the northeast of the main island, and various islets and reefs. By virtue of No. 2002-827 of 3 May 2002 France applied five separate systems of straight baselines encircling the various island and reef groups composing the archipelago; see Chapter 3, p. 156-158. However, the archipelago conforms to the legal definition of archipelagos provided for in article 46 (2) of the LOSC and the drawing the archipelagic baselines encircling the archipelago would conform to the conditions stipulated in article 47. The reefs of Petrie and Astrolabe located in the eastern side of the archipelago would be incorporated in the archipelagic baseline system, as the LOSC provides that archipelagic baselines may be drawn 'joining the outermost points of the outermost islands and drying reefs of the archipelago'. The Chesterfield Islands and South Bellona Reefs are located at distances exceeding 125 n.m. from the main archipelago and thus would not be included within the archipelagic baselines. The same applied to Hunter and Matthew Islands in the east of the archipelago. The island of Walpole in the southeast side of the archipelago could be included within the archipelagic baselines; Prescott states that the baseline joining this feature with the main archipelago would not exceed 76 n.m. and the water-to-land ratio would be respected; J.R.V.Prescott, *The Maritime Political Boundaries of the World* (1985), p. 189-190. The archipelagic baselines would join, thus, the Recif d'Entrecastaux in the North, the Recif Petrie and Astrolabe and the Loyalty Islands, the Walpole Island to the Ile des Pins in the south part of the main island of New Caledonia. Despite the fact that the distances between these geographical features are long, the baselines would meet the conditions of the LOSC by not exceeding 100 n.m.. The water-to-land ratio will also be respected.

[76] The Cayman Islands, located in the western Caribbean Sea and comprised of three islands, namely Grand Cayman, Cayman Brac and Little Cayman, are a British overseas territory. This group of islands indeed composes an archipelago according to the definition prescribed in article 46 (2); moreover, an archipelagic baseline system could be applied encircling the archipelago. The conditions of article 47 (1) would be fulfilled, as the maximum baseline would measure 78 n.m. whereas the water-to-land ratio would not exceed the maximum permissible by the LOSC.

[77] The provisions of this Act can be found at www.un.org/Depts/los/LEGISLATIONANDTREATIES /STATEFILES/ESP.htm; in the Final Provisions of this Act, it is prescribed that the application of this Act, therefore the adoption of an EEZ, will apply only to the Atlantic coasts of Spain both of the mainland and the islands.

configuration of each archipelago'. However, Spain has not proceeded to designate the straight baselines around the archipelago. On the initiative of political representatives from the Canary Islands the possibility of such establishment has been discussed in the Parliament,[78] however it seems that there is hesitancy on behalf of the Spanish government for the enactment of a decree establishing straight baselines around the whole archipelago. As manifested by the following – admittedly ambivalent – statement, the Spanish government has not rejected the potential of establishing such a law: 'The government follows with interest any evolution in the sector of the Law of the Sea and in the regional context, without forgetting the rights recognised by the ... Act 15/78, 20 February and the right of his side to start, provided the appropriate conditions, the pertinent diplomatic contacts for an effective delimitation of the EEZ surrounding the Canary Islands'.[79]

The most recent legislative attempt for the enactment of a law establishing straight baselines around the Canary Islands was initiated in February 2003 by the political party *Coalision Canarias*. This party proposed a draft law to the Senate (*Senado*) relating to the delimitation of the maritime zones of the Canary Islands. This bill was approved by the Senate and was transmitted to the Congress (*Congreso de los Diputados*). The draft law was, however, filed as expired after the work of the legislature terminated in January 2008 because of the parliamentary elections, which took place in March 2008.[80]

The draft law provided for the drawing of 20 straight baselines joining the outermost points of the archipelago. These straight baselines meet the conditions stipulated in article 47 of the LOSC regarding the length of the baselines[81] and the water-to-land ratio. However, the draft law provides that the enclosed waters would have the legal status of internal waters of the state.[82] This is incompatible with the provisions of Part IV of the LOSC[83] according to which the waters enclosed by

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[78] M.A.Saenz de Santa Maria (1994), p. 210.
[79] Answer to written question 684/006364, Boletín Oficial de las Cortes Generales, Senado, IV Legislatura, Serie I; num. 257 as quoted in M.A.Saenz de Santa Maria (1994), p. 211.
[80] In September 2005 the Congress addressed a question to the Legal Service of the Ministry of Foreign Affairs regarding the compatibility of this Law to treaties applicable to Spain, but it seems that no reply was given by the Government.
[81] The longest straight baselines provided measure 98.4 n.m. and 86.7 n.m.
[82] It further provides that 'the rest of the maritime areas recognised internationally shall be considered outside of the straight baselines marking the perimeter of the archipelago'; 9 *Span.YIL* (2005), p. 126-7.
[83] In the introduction of the draft law to the Senate, Senator Rios Perez stated that the draft law was based on the archipelagic concept of the LOSC; Cortes Generales, Diario de Sesiones del Senado, VII

archipelagic waters will be archipelagic waters of the state where third states can exercise the rights attributed to them by the provisions of the LOSC. No such provision has been included in the Draft Law for the delimitation of the maritime zones of the Canary Islands. As mentioned by Martin Ruiz the Canary Islands are located in an area with routes important for navigation and overflight[84] and therefore the internalisation of the waters of the archipelago would be objected by maritime powers interested in the mobility of the commercial and military fleet and the mobility of their military aircrafts.[85] The Draft Law should accordingly be readjusted in order to conform to the provisions of the LOSC concerning innocent passage and archipelagic sea-lanes passage. Compatibility with the provisions of the LOSC on archipelagic states may provide Spain with a legitimate argument regarding the application of a special regime in the Canary Islands. As long as third states' rights are safeguarded within the waters enclosed by straight baselines, these states may be more open to accepting the Spanish claim for the Canary Islands.

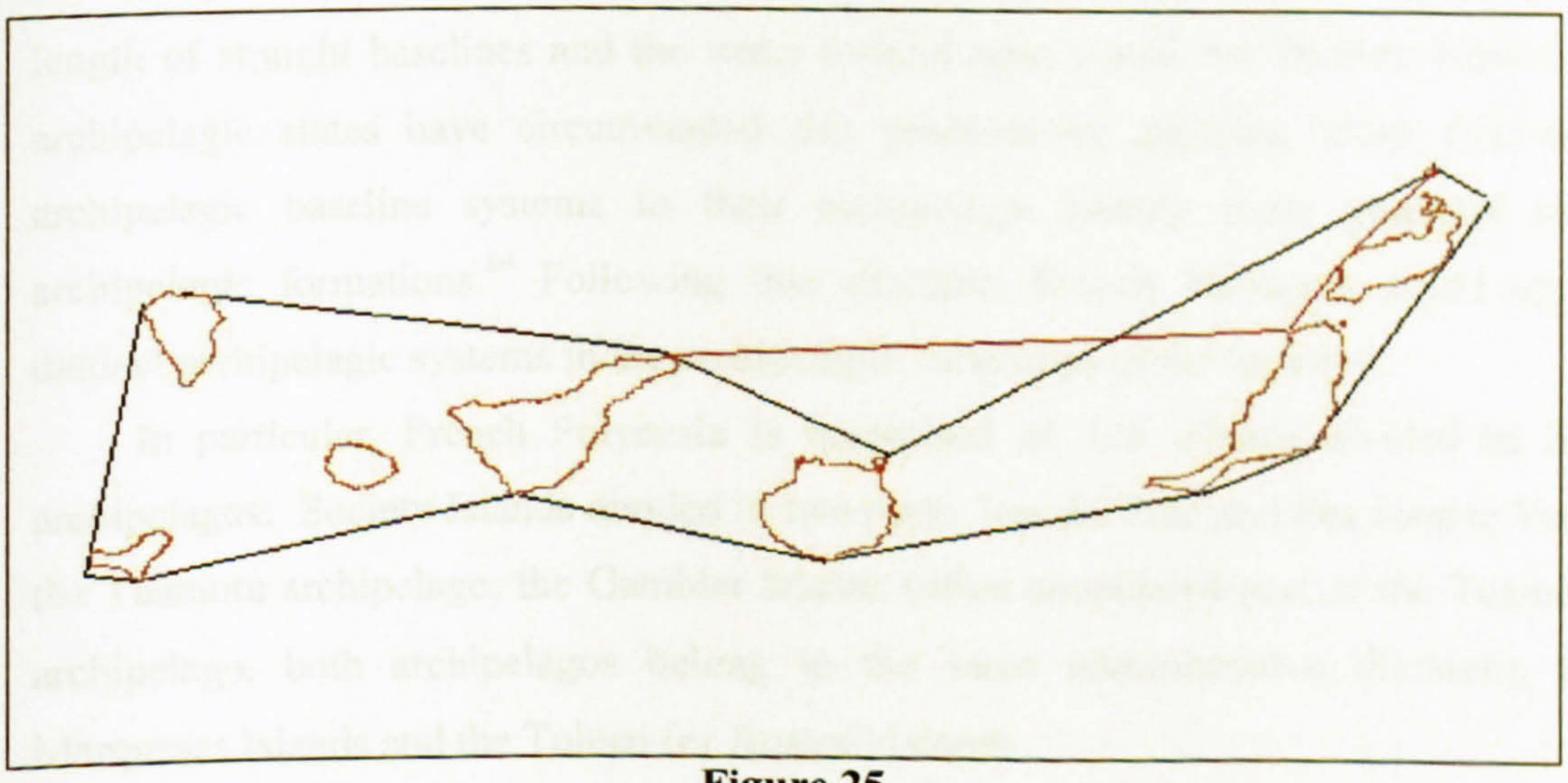

Figure 25

Source: J-F.Martin Ruiz (2005), p. 17 (drawing by the author on the basis of the Draft Law for the delimitation of the maritime zones of the Canary Islands)[86]

Leg. No. 125, p. 7741. A further provision of the law states that this law respects and is based upon international law (Disposición Adicional: Respecto al derecho Internacional y al reparto competencial).

[84] H.F.Martine Ruiz, p. 11.

[85] This is according to Saenz de Santa Maria one of the main reasons why Spain has been reluctant to proceed with the application of straight baselines around the archipelago; M.P.Saenz de Santa Maria (1994), p. 210, 213; however, provided that the rights of third states in archipelagic waters are safeguarded as provided in Part IV of the LOSC, third states may more easily accept the application of an archipelagic regime in the Canary Islands.

[86] The straight baselines in red are based upon a proposal suggested by Juan Luis Suarez de Vivero in 1985 and has been endorsed by Martin Ruiz as more logical and advantageous.

2. French Polynesia

According to Law No. 71-1060 of 14 December 1971 regarding the delimitation of French territorial waters, the maritime zones will be measured from the low-water mark or from straight baselines and closing lines of bays as determined by decree.[87] During the preparatory discussion in the National Assembly, a Député (MP) of French Polynesia suggested an amendment providing that the maritime zones of French Polynesia should be measured from the outermost islands of the archipelago.[88] No Decree has been established prescribing for the application of straight baselines for French Polynesia.

The case of French Polynesia presents an interesting example showing the applicability and at the same time the limits of the application of the archipelagic regime of the LOSC.

It should be initially noted that even if French Polynesia constituted an independent state she could not encircle the whole archipelagic territory in a common archipelagic baseline system as the conditions stipulated by the LOSC regarding the length of straight baselines and the water-to-land ratio would not be met. However, archipelagic states have circumvented this problem by applying more than one archipelagic baseline systems to their archipelago joining more compact sub-archipelagic formations.[89] Following this example, French Polynesia could apply distinct archipelagic systems in the archipelagic subgroups of the territory.

In particular, French Polynesia is comprised of 130 islands divided in five archipelagos: Society Islands divided in two parts: Iles du Vent and Iles sous le Vent; the Tuamotu archipelago, the Gambier Islands (often considered part of the Tuamotu archipelago, both archipelagos belong to the same administrative division), the Marquesas Islands and the Tubuai (or Austral) Islands.

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[87] The law can be found at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES /PDFFILES/FRA_1971_Law.pdf.

[88] Particularly this MP suggested that 'l'ensemble des îles polynésiennes fut limite par une frontière au-delà de laquelle seulement aurai commencé la zone de haute mer, frontière que serait passée à douze milles des îles les plus excentriques'; another (MP) supported this amendment and stated that 'si la Polynésie est constituée d'un nombre très important d'îles, d'îlots et d'atolls, qui sont disséminés sur un espace maritime aussi vaste que l'Europe, elle n'en conserve pas moins une certaine unité'; both quoted by R.Lattion (1984), p. 181-2

[89] J.R.V.Prescott, *The Maritime Political Boundaries of the World* (1985), p. 72; see the cases of the Solomon Islands, Fiji and Papua New Guinea.

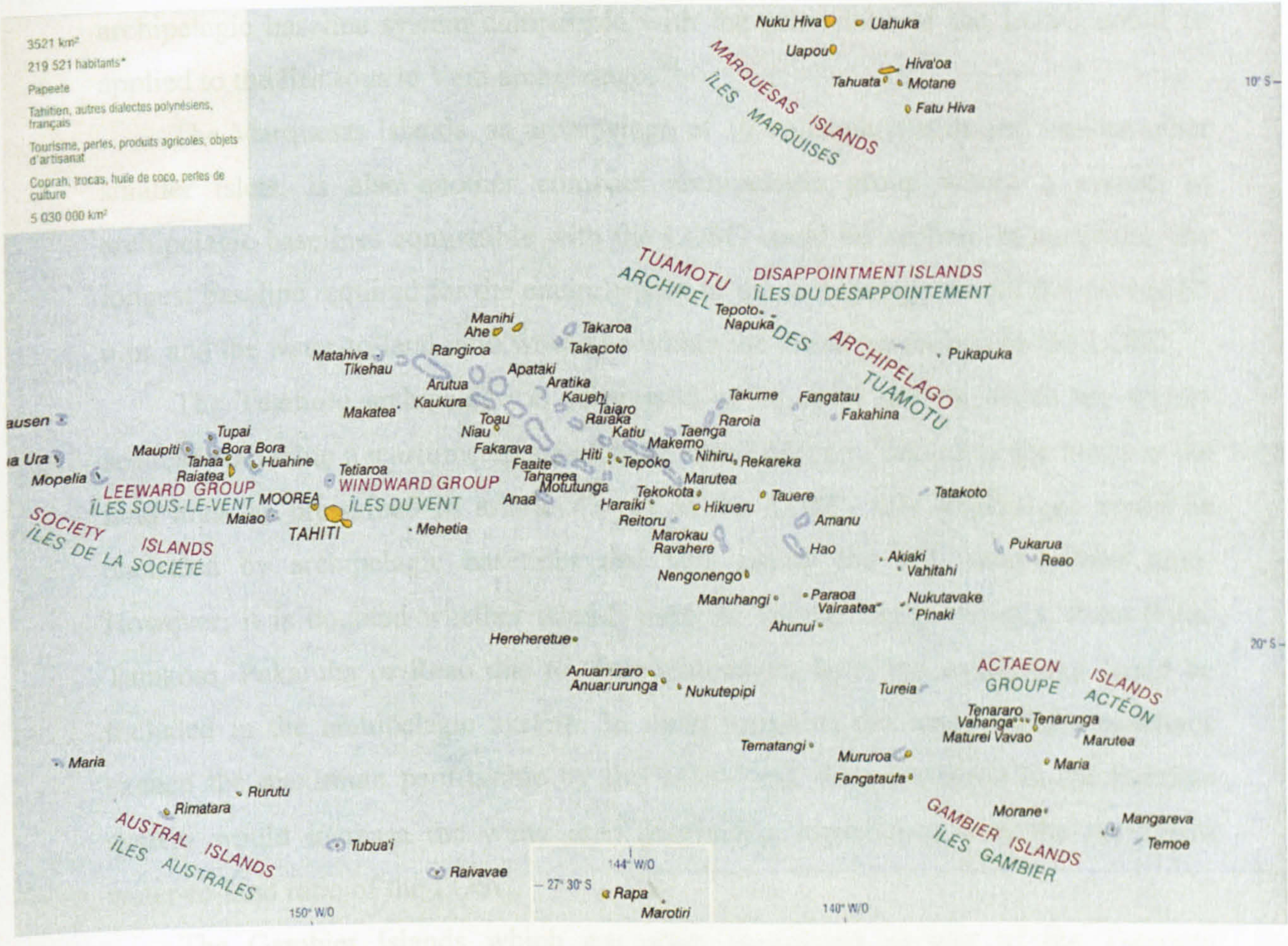

Figure 26

Source: http://www.spc.int/pacifly/Country_profiles/FrPolynesia_map.jpg

Archipelagic baseline systems could be applied to the following archipelagos: The Society Islands cannot be joined in a common archipelagic system as the maximum water-to-land ratio prescribed by the LOSC would be exceeded.[90] However, archipelagic baseline systems compatible with the conditions of the LOSC could be applied to each of the subgroups. In particular, Iles du Vent, comprised of the islands of Maiao, Moorea, Tahiti, Tetiaroa could be encircled by a system of archipelagic baselines meeting the conditions of article 47 (1) of the LOSC.[91] Similarly, an

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[90] However, the length of the baselines required for the encirclement of the archipelago would be compatible with the maximum length prescribed in the LOSC; particularly, the baselines joining the two subgroups together would measure 79 n.m. (joining Raiatea and Moorea) and 64.5 n.m. (joining Huahine and Tetiaroa).

[91] All the archipelagic baselines required for the encirclement of the whole archipelago would measure less than 100 n.m.. The water-to-land ratio condition is also respected.

archipelagic baseline system compatible with the provisions of the LOSC could be applied to the Iles sous le Vent archipelago.[92]

The Marquesas Islands, an archipelago of 10 volcanic islands and various other smaller islets, is also another compact archipelagic group where a system of archipelagic baselines compatible with the LOSC could be applied. In particular, the longest baseline required for the encirclement of the archipelago would not exceed 85 n.m. and the water-to-land ratio would be within the limits prescribed by the LOSC.

The Tuamotu archipelago is comprised of 76 coral islands which are widely scattered covering a maritime space of more that 1,500 km. Including the atolls in the land area, as prescribed in article 47 (1) of the LOSC, this archipelago could be encircled by archipelagic baselines and still satisfy the 1:9 water-to-land ratio. However, it is doubted whether islands such as Tepoto Nord, Napuka, Puka Puka, Tatakoto, Pukaruha or Reao due to their remoteness from the archipelago could be included in the archipelagic system. In most instances the length of the baselines exceed the maximum permissible by the LOSC and their enclosure in the baseline system would increase the water area precluding compliance with the maximum water-to-land ratio of the LOSC.

The Gambier Islands which are often considered as part of the Tuamotu Archipelago could not be included in the same system of archipelagic baselines as the conditions prescribed by the LOSC would not be satisfied. Neither could this archipelago be encircled by a separate baseline system, as the conditions regarding the length of the baselines and the water-to-land ratio could not be met. Some of the islands of this archipelago which are located at close distance such as the islands Maria, Martea Sud, Vahanga, Tenararo, Tenarunga and Maturevavo, could, however, be joined in a common archipelagic baseline system compatible with the conditions stipulated in the LOSC.

The application of archipelagic baselines in the Austral (Tubuai) archipelago would not meet the conditions for such application as the islands composing the archipelago are widely spread at long distances from each other.

It may be shown from the example of French Polynesia that the provisions of the LOSC on archipelagic baselines may provide sufficient assurances for the application

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[92] The baselines required for the encirclement of the archipelago would not exceed 60 n.m.. The water-to-land ratio is also respected.

of the archipelagic regime to more compact groups of islands. The regime of archipelagic waters will ensure that the interests of third states are sufficiently secured in the enclosed waters.

5.3 Conclusion

This Chapter acknowledged the existence of a *lacuna de lege ferenda* in international law with regard to the treatment of broadly-scattered dependent outlying archipelagos. Whereas, the emerging customary rule was found, according to the conclusions reached in Chapter 4, to concern and regulate the case of closely-knit groups of islands, that is, groups the islands of which are located at close distances to each other covering a small maritime space, there is no special regime provided by international law – nor conventional neither customary – for archipelagos which are broadly scattered having wide areas of high seas between the islands. It was argued in the present chapter that there is a gap not in what the law actually prescribes, in so far as the low-water mark rule may be applied, but in what the law should be.

Dependent outlying archipelagos do share the same needs and interests and they should both be attributed the same special protective regime in international law. It was argued that a dependent midocean archipelago is not only a geographical or topographical concept but also a political, economic and historical one, having the same interests and needs as an archipelagic state. The element of statehood was not found as a reason justifying the preferential legal treatment of archipelagic states. Special mention was made to self-governing and non-self-governing archipelagic territories which were treated as 'nascent' or 'quasi' archipelagic states. On the basis of these observations, this Chapter suggested that the archipelagic regime prescribed in the LOSC should also be applied to 'broadly-scattered' dependent outlying archipelagos. This application would not be a detriment to the interests of third states as these interests are satisfactorily safeguarded through the recognition of specific rights in favour of third states within archipelagic waters.

CONCLUSION

I. Overview of the conclusions of the present thesis

This thesis examined the legal status of dependent outlying archipelagos in international law. In particular, it explored the rights attributed to states possessing outlying archipelagos regarding the measurement of the territorial sea and the regime of the waters between and around the islands. The main issues raised and answered by this thesis are the following:

The first issue addressed by this thesis concerns the archipelagic concept and its emergence as a juridical principle in international law. The archipelagic concept was perceived as a solution to the problems stemming from the geographical characteristics of archipelagos. The initial suggestions by legal scholars were based on the application of straight baselines joining the outermost islands of the archipelago and the consideration of the enclosed waters as internal. Whereas in the period preceding UNCLOS III archipelagic proposals referred to groups of islands, the distance between which did not exceed double the breadth of the territorial sea, the archipelagic regime of the LOSC was prescribed to address cases where the archipelago covered a vast maritime space. Moreover, the archipelagic regime as prescribed in the LOSC was restricted to archipelagic states, which were defined as states constituted wholly by islands.

Chapter 1 examined the negotiations of UNCLOS III with a view to reaching a conclusion regarding the exclusion of dependent archipelagos from the archipelagic regime adopted by the Conference. The distinction drawn between archipelagic states and states possessing archipelagos was a political decision reflecting the objections raised by maritime powers to the proliferation of archipelagic waters. This decision also reflected the historical and political context of the Conference; the emergence - due to the decolonisation process - of archipelagic states and of developing states supporting the archipelagic concept and the pressure exercised by them facilitated the adoption of an archipelagic regime solely for archipelagic states. Proposals by some states regarding the analogical application of the emerged archipelagic regime to dependent archipelagos did not attain a consensus among the participants of the Conference.

However, it was argued in Chapter 1 that the negotiations in the Conference disregarded an essential element of archipelagos, namely the variety of their geographic

particularities. The archipelagic regime as adopted in Part IV of the LOSC was drafted to 'fit' the claims raised by the archipelagic states that participated in the Conference and to assuage the concerns of maritime powers in the waters of these archipelagos. Insofar as the decision regarding the restriction of the archipelagic regime to archipelagic states was reached, the negotiations were focused on the reconciliation of the conflicting interests of archipelagic states and maritime powers. In this sense, the regime of the enclosed waters had to be compromised in order to satisfy the inclusive interests of the international community regarding the exercise of traditional uses of the sea in the archipelagic waters. What archipelagic states achieved was the recognition of their sovereignty over archipelagic waters and the application of archipelagic baselines under such conditions so as to satisfy the geographic particularities of the archipelagic states participating in the LOSC.

Focusing on an analogical application of the archipelagic regime as drafted for archipelagic states the proposals of continental states possessing outlying archipelagos disregarded the variety of geographic formations. As suggested in the first chapter of this thesis, islands grouped together at a close distance covering a relatively small maritime space cannot benefit from the application of the archipelagic regime as this would pose more restrictions upon the sovereignty of the states in the area between the islands where the territorial seas overlap. The recognition of a right of passage broader than the right of innocent passage in the archipelagic waters was considered as indispensable for the acceptance of this regime by maritime powers in archipelagos covering a huge maritime space and traversed by routes important for international navigation. On the contrary, the application of straight baselines encircling smaller groups of islands and the enclosure of small 'pockets' of high seas or as should be more common today of EEZs within the baselines cannot be considered to pose a threat to international navigation and thus, the right of innocent passage may be considered as an adequate counterbalance to the enclosure of these waters to a uniform sovereign regime.

On the basis of these considerations, this thesis further explored the possibilities arising from international law regarding the method to be used for the measurement of the territorial sea of the archipelago and the legal regime of the waters between and around the islands and suggested some proposals with regard to the treatment of archipelagos in international law.

The possibilities arising from the LOSC as potential substitutes for the lack of a special regime for dependent outlying archipelagos were initially explored. The first concerned the satisfaction of archipelagic needs and interests through the enhanced coastal jurisdiction in the various maritime zones prescribed by the LOSC, whereas the second concerned the possibility of the use of straight baselines, which is one of the attributes of the archipelagic concept in the sense that straight baselines may be employed encircling the archipelago and unifying the enclosed waters in a sovereign regime.

The first possibility examined in Chapter 2 concerned the satisfaction of the archipelagic concept in terms of needs and interests by the zones of functional jurisdiction recognised by the LOSC. This alternative is based on an argument raised during UNCLOS III that the archipelagic regime is practically redundant because of the adoption of the EEZ, which gives states exclusive access to the exploitation of the marine natural resources at a distance of 200 n.m. from the coast of each island of the archipelago. Similarly, the continental shelf generated from each island and extended at a distance of 200 n.m. or more would offer states sovereign rights upon the natural resources of the sea-bed. It should be noted that this observation concerns solely the application of the archipelagic regime as prescribed in Part IV of the LOSC in the case of dependent outlying archipelagos and not the archipelagic concept in general. A regime providing for the internalisation or territorialisation of the waters enclosed by straight baselines, which could be considered as a more appropriate reflection of the archipelagic concept particularly for closely-knit archipelagos, is certainly more advantageous than any multi-zone regime. In the internal or territorial waters enclosed by straight baselines, the sovereignty of the state is only subject to the right of innocent passage; no other right may be exercised by third states in this maritime zone. The examination of the various maritime zones prescribed by the LOSC in contrast to the archipelagic regime led to the conclusion that a multi-zone regime is inadequate to address satisfactorily the needs and interests of archipelagos, which are better safeguarded in archipelagic waters. The archipelagic regime was found to provide archipelagic states with more extended competences and jurisdiction than the zones of coastal jurisdiction prescribed by the LOSC.

The provisions of the LOSC regarding the use of straight baselines and particularly the relevance of article 7 and 10 were also assessed in Chapter 2. The applicability of article 10 to groups of islands is limited. The application of bay closing

lines may reflect the archipelagic concept if applied to groups of two islands but in broader groups of islands it can only justify the drawing of closing lines in specific parts of the archipelago. The scope of the application of article 7 to groups of islands was found to be broader. Straight baselines may be applied either on a localised basis in parts of an archipelago or to small groups of islands. Particularly, it was argued that in the case where the coast of a relatively large island is fringed by the other smaller islands of the group article 7 may be applied and a system of straight baselines may join the features of the group.

This possibility was recognised in principle by the ICJ in the *Qatar-Bahrain case*, where it was, however, found that the conditions of article 7 particularly concerning the existence of a fringe of islands along the coast were not met in the south-east coast of Bahrain's principal island.[1] Provided, however, that the general conditions of this article are met, the continental state, in whose possession the archipelago lies, may apply a system of straight baselines around the whole archipelago or in parts of it for the delimitation of its territorial sea.

Nevertheless, the application of straight baselines as prescribed in article 7 of the LOSC is not free of problems. The validity of the application of article 7 in the case of dependent midocean archipelagos depends primarily on the interpretation of the conditions stipulated by this article and it is further complicated by the variety of the geographical particularities of each group of islands. The flexibility of these rules initially drafted to regulate the measurement of the territorial sea of a coast fringed with islands resembling the Norwegian model and now called upon to regulate the case of a group of islands is also problematic. Whereas authors, the UN and states such as the USA have advanced a relatively strict interpretation of the conditions stipulated in article 7, states have been flexible in their reading of these conditions and have applied straight baselines in coasts which do not seem to qualify for such application. It was suggested in Chapter 2, where the conditions of article 7 were analysed and adjusted to the case of groups of islands, that an original and 'loose' interpretation of these conditions is required, which might be a matter of controversy among states creating instability in the measurement of the maritime zones of an archipelago.

It should, however, be noted that the application of straight baselines is more advantageous for archipelagos than the application of the archipelagic regime since in

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[1] *Qatar/Bahrain case*, para.. 212-214.

the former case the enclosed waters would be recognised as internal, where the state exercises full sovereignty subject solely to the right of innocent passage.

In Chapter 3, the practice of continental states in their outlying archipelagos was examined. This was done with a dual objective. First, the compatibility of this state practice with the provisions on the LOSC on straight baselines was examined so as to determine the scope and ambit of the application of these provisions to dependent outlying archipelagos. Second, state practice was presented with the view to ascertaining its law-creating value for the evolution of customary law.

With regard to the compatibility of the various instances of state practice with articles 7 and 10 of the LOSC, straight baseline systems used in some archipelagic formations were found to conform to these conditions. Geography plays its part in this respect, as it is mainly archipelagic features composed of one or two larger islands and surrounded by smaller islands which meet the requirements for the application of article 7. Archipelagos such as the Kerguelen Islands, Sjaelland and Furneaux Group could be classified in this category. On the contrary, Article 7 is inapplicable in cases concerning archipelagos with similarly sized islands or with islands located in a random way. The examples of state practice examined in this Chapter illustrated the limited scope of the use of article 7 for dependent outlying archipelagos.

Despite the geographical multiformity, the practice of these continental states was found to reflect a common element sufficient to distinguish it from other practices regarding the application of straight baselines. The archipelagic concept – due, it is true, to its vague content - succeeds to an extent in uniting all the geographic types of archipelagos into a legal category in which the application of straight baselines would lead in the unification of enclosed waters in a sovereign regime. The practice of states is inspired by this concept.

Chapter 4 examined whether certain instances of the practice of continental states in their outlying archipelagos may be deemed as valid under special customary rules stemming from and regulating each particular case according to the degree of acceptance of the particular system by the states of the international community. The establishment of such special customary rights was ascertained for the Galapagos Islands and the Faroe Islands. These systems have been applied for an adequately long period of time being accepted either explicitly or implicitly by other states. It was thus concluded that both of these systems are valid in international law on the basis of

special customary rules. Similar cases could also be deemed as valid under special customary law insofar as other states have accepted them as such.

Chapter 4 further assessed whether the practice of continental states consisting in applying straight baselines in their outlying archipelagos has led to the establishment of a rule of general customary law attributing a special regime to dependent outlying archipelagos. To this end, this Chapter explored and analysed the various elements appertaining to the establishment of customary law, namely state practice, *opinio juris* and the reaction of the international community vis-à-vis this practice.

The practice of continental states in their outlying archipelagos is diverse. There are states which have applied a straight baseline system to their outlying archipelagos and others which are using the low-water mark on the coast of each island for the measurement of the maritime zones. To some extent, this divergence in practice was explained on the basis of the geographic realities of archipelagos and the perception of states regarding the limits of the application of straight baselines to groups of islands. Particularly, in the cases where no special system has been applied, the archipelagos are scattered in a broad maritime space; in such case, the application of straight baselines would lead to the enclosure of a large maritime area restricting importantly the freedom of navigation. On the contrary, most instances of state practice where a straight baseline system has been applied concern closely-knit archipelagos where the enclosed waters are closely linked to the land domain of the islands. Despite these explanations, the practice of continental states in their outlying archipelagos was not found to be general enough so as to have led to the establishment of a rule of customary law. However, the impact of this considerable practice upon the evolution of international law is important and customary international law was found to be emerging particularly as the other constituent elements of international custom were present, namely the states engaged in the practice consider their behaviour as consistent with international law (*opinio juris*) and most of the states of the international community have not protested against or officially objected the established systems.

State practice and the emerging rule of customary law were found to concern closely-knit archipelagos where the distances between the islands are short and where there is a strong link between the enclosed waters and the land domain. Indeed, from the analysis of the systems applied in the cases discussed, it was observed that states have not applied the archipelagic regime as prescribed in the LOSC for archipelagic states but have applied the concept of straight baselines (an application of which is

article 7 of the LOSC). They, thus, regard the enclosed waters as internal and not as archipelagic, restricting in this way the navigational and other rights of third vessels in these waters and only in few cases do they provide for the right of innocent passage. In this respect, such application was deemed to reflect the principles enunciated by the ICJ in the *Fisheries case*. It was argued in the present thesis that states have adopted, adapted and applied these principles in instances exceeding the limits of the case examined by the ICJ in the *Fisheries case*. These principles have inspired and motivated continental states in applying straight baselines to their outlying archipelagos and may be deemed to have shaped the conditions and determined the limits of the emerging customary rule based on this practice. These principles were analysed in Chapter 4 and it is argued that they stipulate the limits of the emerging rule and consequently the ambit of the application of straight baselines to groups of islands. They are briefly set out here as following:

(a) The sea areas lying within the baselines should be sufficiently closely linked to the land domain to be subject to the regime of internal waters and there should be a 'close relationship existing between certain sea areas and the land formations which divide or surround them'.[2]

(b) 'The drawing of baselines must not depart to any appreciable extent from the general direction of the coast'.[3] Despite its vagueness this criterion may be useful in the determination of the coherence of the archipelago as a whole. The practical aspect of this criterion may be that exorbitant long baselines will not conform to the application of the straight baseline principle, in view of the fact that in such a case the baselines will be likely to deviate from the outline of the archipelago as this is reflected in the mutual geographical attraction of the islands; in the same sense, long baselines are likely to lead to the enclosure of waters not closely linked to the land domain which according to the previous criterion would preclude their characterisation as internal.

(c) The existence of local interests, such as economic, environmental, historic or other, may justify the drawing of particular baselines. This criterion, as used by the ICJ in the *Fisheries case*, may be used as exceptionally - on the basis of the exclusive interests of the state in the specific area - validating specific straight baselines which would otherwise be incompatible with the above criteria.

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[2] *Fisheries case*, p. 133. See also article 7 (3) of the LOSC.
[3] *Ibid*, p. 133.

Though vague, these principles have a degree of flexibility which ensures that the individual geographic particularities of archipelagos are taken into consideration when applying a system of straight baselines to a group of islands.

Therefore, customary international law, which is in the process of emergence, was found to regulate – on the basis of state practice and according to the conclusions reached in Chapter 4 – 'closely-knit' groups of islands. However, many archipelagic formations are broadly scattered in a maritime space. For these cases, there is no indication in state practice of the establishment of any special system for the delimitation of their maritime zones and the attribution of any special regime for their waters. In this respect, a *lacuna de lege ferenda* in the treatment of these archipelagos was acknowledged in international law. To fill this gap the present thesis suggested that the archipelagic regime of the LOSC should be analogically applied in the case of broadly scattered archipelagic formations. It was argued that a dependent midocean archipelago is not only a geographical or topographical concept but also a political, economic and historical one with the same interests and needs as an archipelagic state; in this respect, the element of statehood as a differentiating element between archipelagos was found as arbitrary. It was thus concluded that the protective regime should coincide for both archipelagic states and broadly scattered dependent archipelagos.

Particular reference was made to self-governing or non-self-governing archipelagic dependencies. These archipelagos were considered as 'quasi' or 'nascent' archipelagic states, in so far as the only impediment to their being considered as archipelagic states according to the LOSC and to their claiming an archipelagic status is the declaration of their independence. The distinction between archipelagos on the basis of their political status is particularly detrimental to self-governing archipelagic territories. It was thus suggested that an analogical application of the archipelagic regime of the LOSC seems justified.

It was finally concluded that the rights and interests of third states in the archipelagic waters would not be impaired by the application of the archipelagic regime to broadly scattered dependent outlying archipelagos. It was argued that the imposition of specific conditions for the application of archipelagic baselines and the recognition of specific rights exercised in the archipelagic waters by third states can safeguard satisfactorily the interests of third states.

II. The manifestation of the archipelagic concept in international law

The main position advanced by the present thesis with regard to the manifestation of the archipelagic concept in international law concerns the need to have a common treatment of archipelagos in international law not on the basis of their political status, as has been prescribed by the LOSC, but on the basis of their geographic particularities.

The archipelagic regime of the LOSC – despite its inadequacies – has been consolidated in international law as an established concept and has been applied in practice by archipelagic states without major problems.[4] Part IV of the LOSC is, indeed, an expression of the archipelagic concept, expanding and restricting at the same time its application. Particularly, the archipelagic regime is to be applied to archipelagos consisting of islands broadly scattered in a large maritime space. Due to this spatial expansion, concessions had to be made with regard to the regime of the enclosed waters. The exercise of innocent passage and archipelagic sea-lane passage by third states' vessels in the archipelagic waters was a result of such compromise.

However, practice as expressed mainly by continental states in their outlying archipelagos has raised the issue of the existence of a different manifestation of the archipelagic concept, which could be applied to archipelagos not qualifying for the archipelagic regime. This state practice and the emerging customary rule have shown that the archipelagic regime as prescribed by the LOSC may not be the most appropriate solution for all archipelagic features. The rationale in the application of the archipelagic concept is certainly the same, that is the use of straight baselines joining the outermost points of the archipelago or parts of it, the consideration of the archipelago as a whole for the measurement of the maritime zones and finally the recognition of a uniform, sovereign-like regime for the enclosed waters. What changes, however, is the regime of the enclosed waters and the accommodation of the exclusive rights of the archipelago and the inclusive rights of third states in these waters. According to the conclusions reached in the present thesis, the application of the archipelagic concept particularly regarding the regime of the enclosed waters should be dependent upon the particular geographic realities; in this sense, the archipelagic concept may take two forms in international law:

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[4] The provision creating friction among states concern the designation of archipelagic sea-lanes and the exercise of archipelagic sea-lanes passage particularly in Indonesia and the Philippines.

(a) In small archipelagic formations where the islands composing the archipelago are located at a close distance to each other covering a small maritime space, straight baselines may be applied joining the outermost islands of the archipelago. The conditions for the application of straight baselines, which are based on the practice of continental states in their outlying archipelagos, have been analysed in Chapter 4 of the present thesis. In this case, the enclosed waters would have the status of internal waters of the state. Article 8 (2) of the LOSC could be applied recognising the right of innocent passage for third states' vessels in waters which did not have the status of internal waters before the drawing of straight baselines. This has not, however, been reflected in the practice of the states applying straight baselines to their outlying archipelagos. Another possibility which could offer a feasible solution to passage rights in the enclosed waters concerns the recognition of the right of innocent passage not in the entirety of these waters but solely in routes of international navigation traversing the archipelagos. This practice has been adopted and applied by the UK in the Turks and Caicos archipelago but has not been reflected in any other state practice.

This system has been used in state practice by both continental states in their outlying archipelagos and archipelagic states, which due to the 1:1 restriction in the water-to-land ratio posed by article 47 (1) of the LOSC, cannot apply the archipelagic regime. However, it cannot yet be said to have acquired the status of customary international law due to divergent state practice, but, as has been argued in this thesis, there is a definite trend in international law and a customary rule establishing such system is emerging.

(b) In the case of larger archipelagic formations which are spread in a broad maritime space and whose islands are located at a considerable distance from each other, the archipelagic regime as prescribed by the LOSC may be applied. In that case the requirements regarding the drawing of archipelagic baselines (article 47 of the LOSC) should be fulfilled and the enclosed waters will have the status of archipelagic waters, where third states may exercise the rights of innocent and archipelagic sea-lane passage (articles 49, 52-3 of the LOSC).[5]

The manifestation of the archipelagic concept in two forms on the basis of geographic particularities may be justified on the basis of the inclusive interests of the

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[5] The LOSC recognises the rights of third states concerning traditional fishing rights of immediately adjacent neighbouring states and existing submarine cables; however the implementation of such provisions has not caused any problem in practice see for example the Indonesia – Malaysia agreement mentioned in Chapter 1, p. 58, note 205.

international community. In the first case of closely-knit groups of islands, third states should not be thought to have important interests in the waters which lie so close to the islands of the archipelagos and even if they have interests in those waters, the need of the archipelago to protect its fragile territory in terms of security, economic and environmental concerns seems to outweigh them. The potential recognition of innocent passage may be deemed adequate for safeguarding such interests in terms of navigation in the waters of such archipelagos.

In the case of larger archipelagic formations, the enclosure of a broad maritime space would alarm maritime powers, which are interested in the mobility not only of their commercial fleets but also of their military navy and particularly of their air forces (in the case of innocent passage there is no recognised right of overflight). Despite the fact that the notion of archipelagic sea-lanes passage has been criticised as imposing too much burden upon the archipelagic states – and the present author would agree with this criticism – it may be inferred from the negotiations of the Third Conference on the Law of the Sea[6] and by state practice[7] that maritime powers would have never agreed to the archipelagic regime without the reassurance of the preservation of routes of navigation and overflight.

Additionally, in cases of archipelagos, in which the islands are located at a distance not exceeding double the breadth of the adopted territorial sea from each other, the archipelagic regime of the LOSC would be undesirable, as it would create more restraints to the sovereignty of the state in the waters between the islands, where the rights of innocent passage and archipelagic sea-lane passage are applicable, than those which would exist if this maritime space had the status of the territorial sea, where only the right of innocent passage is recognised. In these archipelagos, the internalisation of the enclosed waters seems more appropriate for satisfying archipelagic needs and safeguarding archipelagic interests.

What is more, there is a causal relationship between the geographic realities of a group of islands and the existence of straits/routes used for international navigation in its waters. It is unlikely that straits or routes used for international navigation will exist in closely-knit archipelagos either due to their small size or due to the location of the

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[6] See Chapter 1, p. 58-62.

[7] For example, the US Navy and Air forces have been active in asserting operationally their passage rights through navigation routes in the Philippines, which claims the enclosed waters as internal; see Freedom of Navigation Program See also US Department of Defense, Freedom of Navigation FY 2000-2003 Operational Assertions (found at www.defenselink.mil/policy/sections/policy_offices/isp/fon_fy00-03.html).

islands. Part IV of the LOSC recognises that in the case where no such routes exist, third states vessels will exercise the right of innocent passage and not of archipelagic sea-lane passage.[8] The geographic realities of archipelagos have thus an impact upon the accommodation of third state's rights within its waters. In this sense, the two manifestations of the archipelagic concept in international law, as mentioned above, are two aspects of the same phenomenon in the sense that the additional navigation rights attributed to third states in the form of archipelagic sea-lanes passage would not exist unless there is a 'route normally used for international navigation' in the archipelagic waters.

In this sense, the emerging customary rule concerning closely-knit archipelagos and the application of a special system to broadly-scattered archipelagos are closely related. It could be said that the latter is a further evolution of the emerging customary rule. The difference in the application of the archipelagic concept lies in the fact that in closely-knit archipelagos there is no actual need (as manifested from state practice) for the recognition of extended third states' rights regarding navigation and overflight. In the case of broadly-scattered archipelagos, recognition of these rights would help states making these claims – provided of course that there is political will on behalf of states to apply such a system – to have their system recognised in international law. The Canary Islands have demonstrated their desire to apply such a system. Similar proposals have been made by representatives of French Polynesia. It remains to be seen whether the states administering them would benefit from customary law in order to apply such a regime. Abiding with the conditions posed by Part IV of the LOSC would promote the legitimacy of their claims in international law.

III. International law and archipelagos: fragmentation and uniformity

A major problem with regard to the legal articulation of the archipelagic concept concerned the accommodation and the taking into consideration of the diverse geographic particularities presented by each archipelagic feature. Kusumaatmadja observed in 1972 that taking into consideration state practice 'one cannot escape the feeling, in considering the possibilities of devising new rules on the regime of outlying archipelagos, that one is engaging in patchwork'.[9] The problem of creating a uniform regime covering such diversity in geography created doubts with regard to its success.

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[8] This stems from a combination of para. 1, 4 and 12 of article 53 LOSC.
[9] M.Kusumaatmadja (1973), p. 171

Leversen stated in 1971 that the adoption of a single method as a solution to the archipelago problem would be 'doomed' 'because of the diverse geography of the various archipelic states. Some are closely-knit groups of islands covering relatively little area, while others are spread out over miles of ocean'.[10]

It is true that the treatment of each archipelago on the basis of its particular needs and interests and the relevant accommodation of the interests of the international community with regard to the particular archipelago seem tempting. However, the fragmentation of international rules governing archipelagos could only be achieved through the signing of agreements equalling the number of archipelagos; these agreements should be universally negotiated and concluded, as all the states of the international community have interests in the law of the sea. The conclusion of all these international agreements would be practicably impossible particularly due to the difficulties arisen for negotiation of each individual archipelagic regime and the rights enjoyed by each party.[11] The existence of special regimes covering particular dependent outlying archipelagos has been discussed in the present thesis but it has only been treated as an alternative to the absence of a uniform rule for the treatment of archipelagos and particularly, as argued, as a first step to the emergence of a general rule of customary law.[12] Moreover, law in general should not be based on a circumstantial basis but should regulate similar cases in a uniform manner in order to promote stability in the application of international law.[13] Besides, taking into consideration that the archipelagic regime of the LOSC has been widely accepted and applied without major problems in archipelagic states, it may be concluded that a uniform regime may indeed exist and be effectively applied.

What, we can, however, keep from Leversen's criticism is the fact that the diversity of archipelagic formations should have been taken into consideration for the resolution of the archipelagic problem. The gap created by the adoption of the archipelagic regime of the LOSC only for archipelagic states was covered by the

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[10] M.A.Leversen, 'The Problems of delimitations of baselines for outlying archipelagos', 9 *San Diego Law Review* (1971-2), p. 744-5. See also Gidel who pointed out that 'vouloir donner par un texte général unique la solution de problems dont les conditions sont si différentes, c'est poursuivre une tache irrealisable'; G.Gidel (1934), p. 720.

[11] See Chapter 1, p. 51-2 on the negotiations attempting to balance conflicting state rights.

[12] See Chapter 4, p. 215-218.

[13] Hodgson, while stressing the unique geographic particularities of each island group, pointed out that 'certain generalisations may be made for the sake of simplification and classification'; R.D.Hodgson (1973), p. 6. Dubner rejected the resolution of the archipelagic problem on the basis of accepting a special regime for each of the archipelagic states and contended that 'international law should provide a common formula for all of the archipelagic states'; B.H.Dubner (1976), p. 77.

practice of continental states in their outlying archipelagos, which has, according to the findings of this thesis, led to an emerging general customary rule regulating the case of closely-knit groups of islands. The dual manifestation of the archipelagic concept in international law takes into account the different geographical characteristics presented by archipelagos particularly on the basis of their size and maritime coverage.

IV. Straight and archipelagic baselines, accommodation of conflicting interests and the archipelagic concept

According to the LOSC, straight baselines can be solely applied in the cases prescribed in Section 2 of this Convention referring to the limits of the territorial sea. The application of straight baselines by states particularly on the basis of article 7 referring to coasts deeply indented and cut into or fringed by islands has been characterised – and in many cases not without reason – as abusive and the whole straight baseline concept has been criticised as a means of expanding maritime jurisdiction. Reisman and Westerman contend that the real objective behind the original use of straight baselines was the expansion of coastal jurisdiction as at that time 'there was no legitimate alternative conception for achieving that end'.[14] They, therefore, argue that nowadays after the 'explicit international legitimisation of broad coastal seaward jurisdiction for all other uses' straight baseline systems are an 'anachronism' and are no longer justified.[15] In particular, as regards the application of straight baselines to groups of islands, they have rejected the legality of such possibility as a distortion of well-established rules of the law of the sea considering archipelagos.[16] On this basis, these authors have urged for a cogent and disciplined conception of the straight baseline regime and stressed the need for a new policy.

However, it seems that the main objective of the use of the straight baseline principle is misconstrued. Its main function focuses on the enclosure of those waters which due to their close interrelationship with the land should be treated as internal for

[14] M.W.Reisman & G.S.Westerman (1992), p. 192; they particularly refer to the motivation of Norway in establishing a straight baseline system along its coast which was according to their interpretation due to their concern to protect the fishing resources upon which the population was dependent. They characteristically state that 'in an effective, if not formal, sense, the first straight baseline was, then an exclusive fishing zone', *ibid.*

[15] *Ibid*, p. 195-6.

[16] They have particularly stated that such application 'frustrates other well-established rules, also carefully drafted, that have achieved community consensus over a long period of time. In keeping with the strict interpretative approach set forth in this chapter, it is argued that the straight baseline option must not be used as an alternative basis for the enclosure of failed bays or failed archipelagos': *ibid*, p. 103.

the protection of the coastal state.[17] It is true that the maritime zones generated by straight baselines would be shifted seaward but that does not affect the primary objective of the use of straight baselines, which is to safeguard the interests of the coastal state in the waters lying adjacent to its coasts.[18]

It should also be noted that archipelagic baselines, which are a particular category of the straight baseline principle, have the same function concerning the protection of a maritime space through its enclosure by straight baselines and its submission to a uniform sovereign regime. Indeed, a different name for straight baselines was decided for archipelagos during UNCLOS III – primarily under the pressure of maritime powers, in order to differentiate the regime of enclosed waters particularly with regard to the rights exercised therein by third states' vessels. However, both straight baselines and archipelagic baselines do share the same rationale which is the protection of the enclosed waters.

Furthermore, as argued by the present thesis, the application of straight baselines to groups of islands is not a distortion of established rules but an evolution of international law on the basis of state practice. Indeed, state practice is important in the formation of the law and in the case of outlying archipelagos the practice has showed sufficient uniformity in order to initiate a change in law regarding the application of straight baselines to groups of islands.

What is more, the acceptance of such a rule of customary law regarding the designation of straight baselines in groups of islands on the basis of the conditions analysed in this thesis would attain 'basic objectives of the law of the sea' as they are actually set out by Reisman and Westerman: 'to define the rights of the parties, to reduce the likelihood of conflict, to provide clear guidelines for mariners, and to make an equitable allocation of ocean space and resources which may serve both the inclusive and exclusive common interests of all states'.[19] The acceptance of the emergence of a customary rule relating to the application of straight baselines to groups of islands would certainly serve the first three objectives. Indeed, since such practice

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[17] *Limits in the Seas, No.124: Straight Baseline Claim: Honduras*, p. 2: 'the purpose of authorising the use of straight baselines is to allow the coastal state, at its discretion, to enclose those waters that have, as a result of their close interrelationship with the land the character of internal waters'. Certainly, it should not be ignored that straight baselines are preferred to other baseline methods as they may 'eliminate complex patterns including enclaves in its territorial sea': J.A.Roach & R.W.Smith (1996), p. 60.

[18] This objective was emphasised by Gihl as a justification for the application of straight baselines to the Norwegian coast and for the need to attribute to the enclosed waters the status of internal waters; T.Gihl, 'The Baseline of the Territorial Sea', 11 *Scandinavian Studies in Law* (1967), p. 134.

[19] M.W.Reisman & G.S.Westerman (1992), p. 74.

exists and cannot be ignored in international law, its acceptance as legal on the basis of a rule of customary international law would reduce the likelihood of conflict and would provide clear guidelines for mariners.[20] Moreover, the rights of the states possessing the archipelago and of third states would be effectively defined in the various maritime zones inside and around the archipelago.

With regard to the conflict between the inclusive interests of the international community and the exclusive interests of the archipelago, it should be acknowledged that the application of straight baselines would indeed restrict the rights of the former in favour of the rights of the latter. In particular, the use of straight baselines would 'push' the external limit of the maritime zones seaward extending the coastal jurisdiction of the state in the area surrounding the archipelago. However, the extension of the maritime zones generated from the archipelago as a compact whole is only to be marginal in comparison to the use of the low-water mark at the coast of each island in the outline of the archipelago.[21] Particularly, closely-knit groups of islands would not require the use of very long straight baselines for their encirclement and therefore the actual gain in the waters surrounding the archipelago would be small.[22]

With regard to the enclosed waters, the application of straight baselines would internalise waters, which would normally be either parts of the territorial sea, the EEZ or in cases where no EEZ has been declared of the high seas and therefore, the rights exercised in these waters by third states would be restrained. However, as long as the islands of the archipelago are located in close proximity to each other – which is one of the basic conditions for the application of straight baselines to groups of islands - the proliferation of internal waters to the detriment of the other maritime zones, where third states enjoy various rights, will be small.

The internalisation of parts of the territorial sea will not be a detriment to the rights of third states as long as the right of innocent passage is retained in such waters (article 8 (2) of the LOSC). In that case, third states' rights would only be impaired in the case where the internalisation of waters closes straits of international navigation,

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[20] Scovazzi pointed out in 1999 with regard to the use of straight baselines that 'the general situation is far from being satisfactory, as the principe of certainty of the law is put into question and international disputes may easily multiply'; T.Scovazzi (1999), p. 455.

[21] Jayawardene finds that 'the only effective difference would be that the outer perimeter of the economic zone would be demarcated by straight lines rather than by curves, whose exact location on charts would be harder to ascertain'; H.W. Jayawardene (1990), p. 154.

[22] Prescott, Reisman and Westerman recognise the use of long baselines as the main reason for the increased seaward extension of state jurisdiction; M.W.Reisman & G.S.Westerman (1992), p. 105; J.R.V.Prescott in G.Blake (ed) (1987), p. 48.

which were subject to the regime of transit passage. In that case, however, the interests of the archipelago to protect its fragile security and face environmental dangers should be deemed as outweighing the rights of third states.[23] This would concern particularly, military vessels, mostly submarines and aircrafts, as the interests of commercial fleets may be adequately safeguarded by the right of innocent passage. What is more, in closely-knit groups of islands it is very likely that there are navigational routes of equal convenience in the maritime space around the archipelago, which may be used by third states vessels or aircrafts. On the contrary, broadly scattered archipelagos would normally be composed of straits or routes important for international navigation in the sense that any alternative routes would require vessels to deviate hundreds of miles around the archipelago.[24]

In the case in which the drawing of straight baselines would internalise waters having the legal status of the EEZ or the high seas, third states' rights would indeed be restricted particularly with regard to navigation and overflight.[25] However, taking into consideration that these waters are closed within the archipelago, the accommodation of interests should be considered as favouring the protection of the archipelago mostly in terms of security and environmental considerations[26] than the freedom of navigation of third states.

Furthermore, as analysed in Chapter 5, the application of the archipelagic regime to dependent archipelagos which are widely scattered in a broad maritime space would not pose a threat to the inclusive interests of the international community. The latter are sufficiently safeguarded and protected through the recognition of specific rights exercised by third states' vessels and aircrafts in archipelagic waters.

In this sense, the application of straight baselines to closely-knit archipelagos and the application of the archipelagic regime to broadly-scattered dependent archipelagic formations should not be seen as a way of 'creeping' jurisdiction but as a means of protecting the archipelago.

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[23] Scovazzi agrees with this and states 'the need for naval mobility, which is undoubtedly an important consideration, is not the only interest which finds expression in the marine context. The need to develop in a sustainable way local economic activities and to protect the coastal environment should also be taken into account. These needs might justify reasonably liberal systems of straight baselines'; T.Scovazzi (1999), p. 455.

[24] See Chapter 4, p. 272-275, part. Notes 334, 336 and 350.

[25] J.R.V.Prescott in E.D.Brown & R.R.Churchill (eds) (1987), p. 317 (referring to the application of straight baselines in coasts of a mainland).

[26] See Chapter 1 for the various reasons supporting the archipelagic concept, p. 39-41; however, economic reasons seem to be satisfied on the basis of the EEZ.

APPENDIX

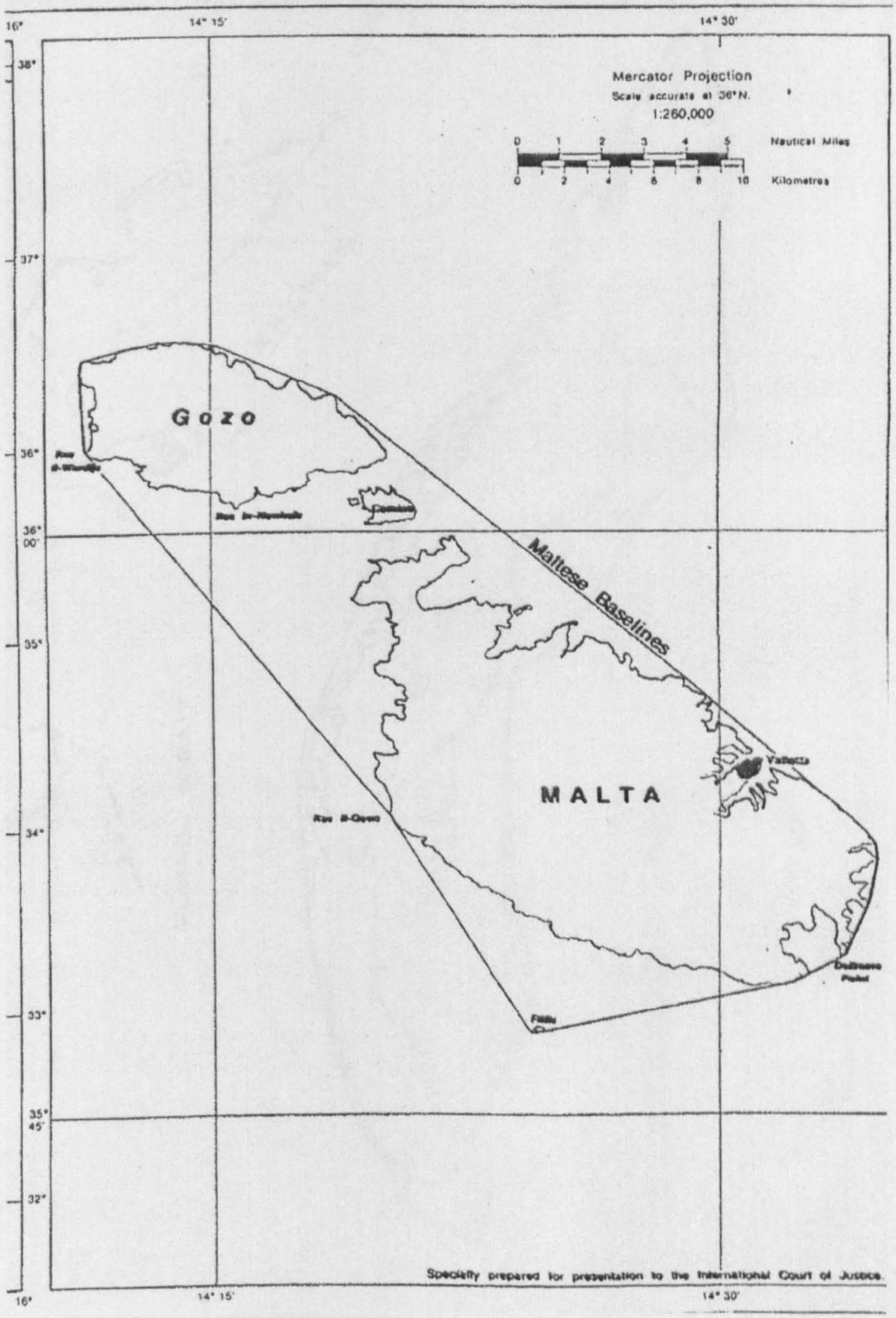

Figure No. 1: Straight baselines, Malta

Source: Continental Shelf case (Libya Arab Jamahiriya/Malta), Memorial submitted by the Republic of Malta, Pleadings, Vol. III, Map No. 2.

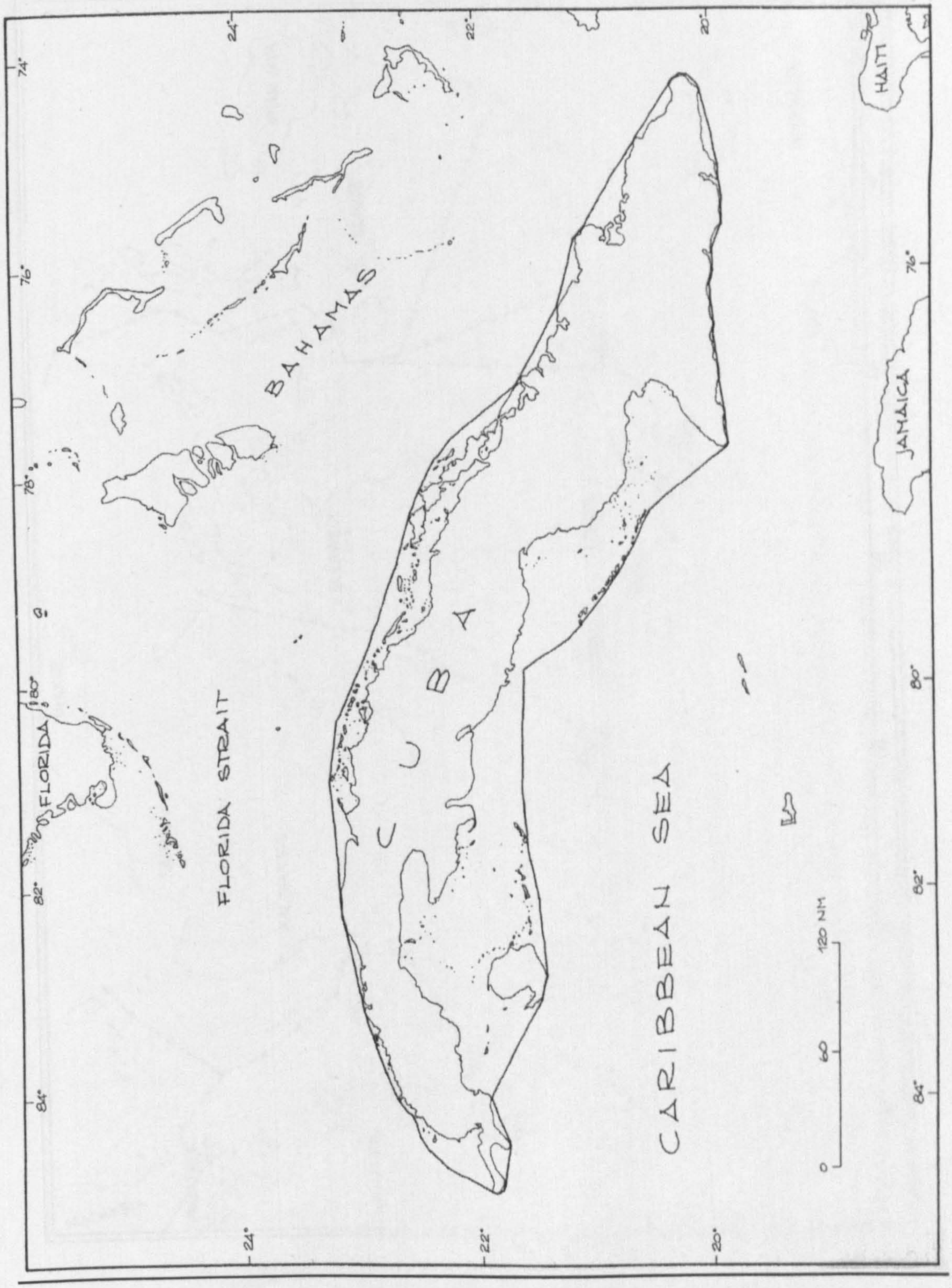

Figure No. 2: Straight baselines, Cuba

Source: US State Department, Limits in the Seas No. 76: Straight Baselines: Cuba (October 1977)

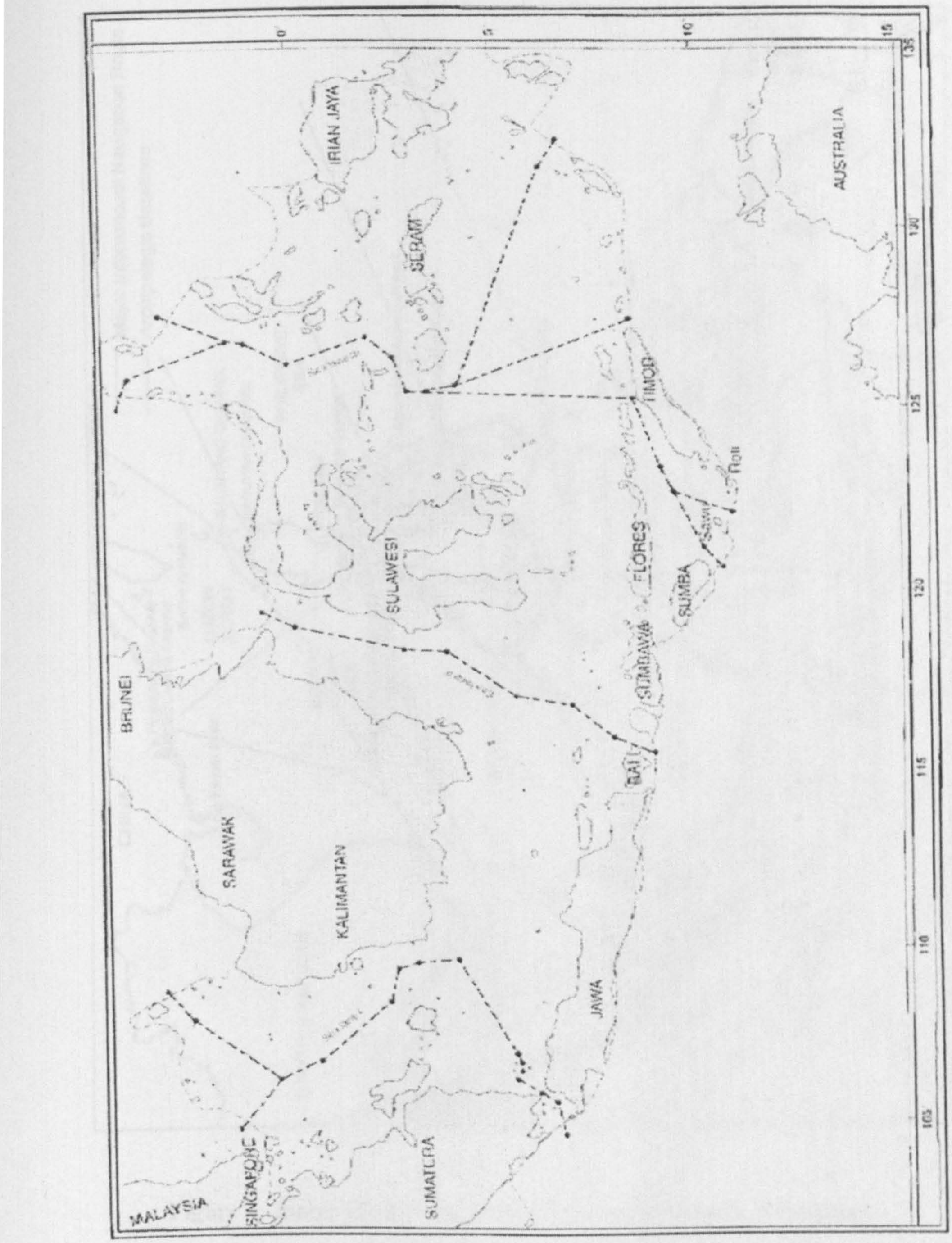

Figure No. 3: Archipelagic sea lanes - Indonesia

Source: Indonesian Government Regulation No 37, 2002 on the Rights and Obligations of Foreign Ships and Aircrafts exercising the Right of Archipelagic Sea Lane Passage through designated Archipelagic Sea Lanes, Annex VII, 52 LSB (2003).

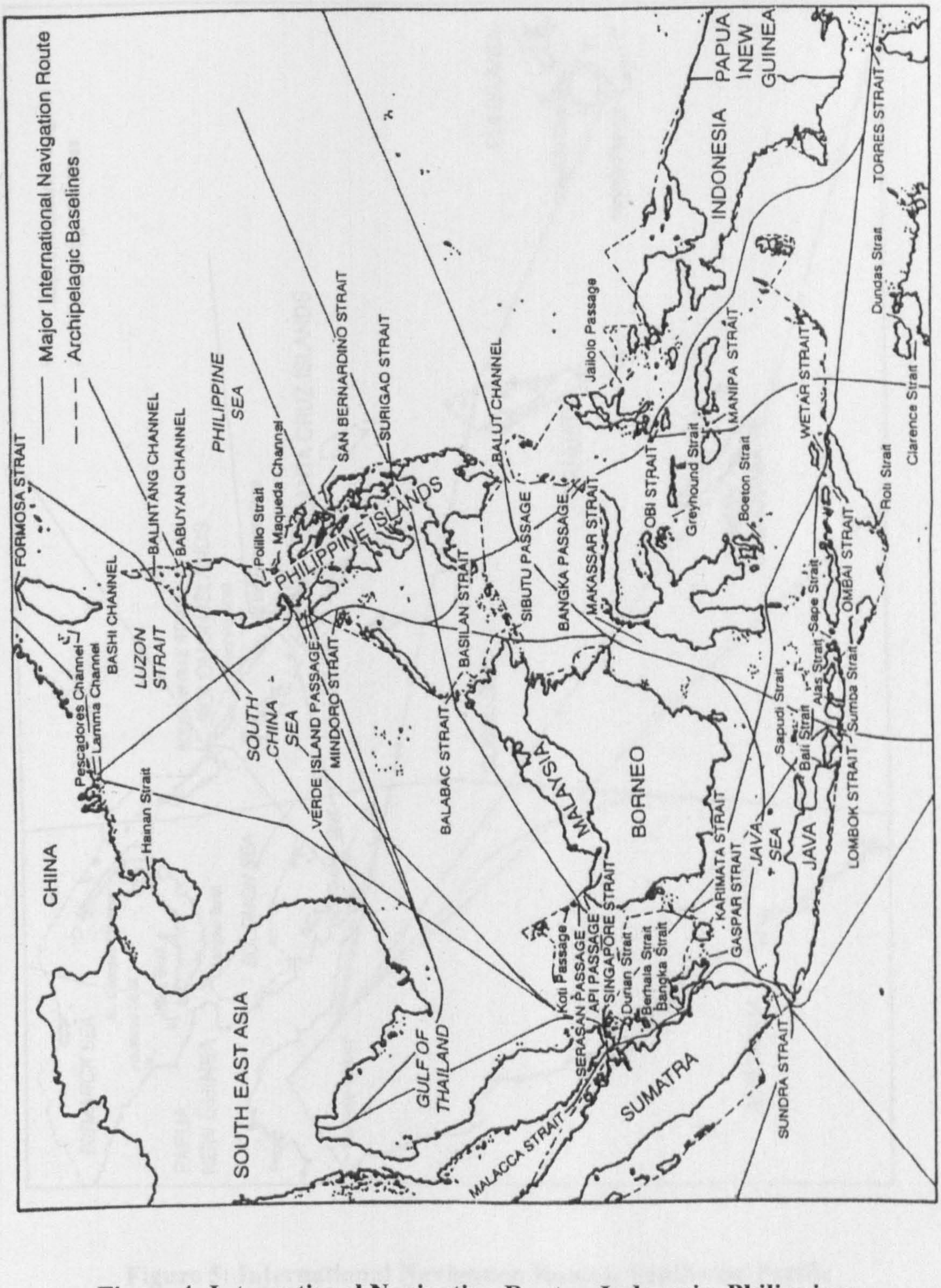

Figure 4: International Navigation Routes: Indonesia, Philippines

Source: L.M.Alexander, *Navigational Restrictions within the New Law of the Sea Context: Geographical Implications for the US* (offshore Consultants Inc. Peace Dale, Rhode Island, December 1986).

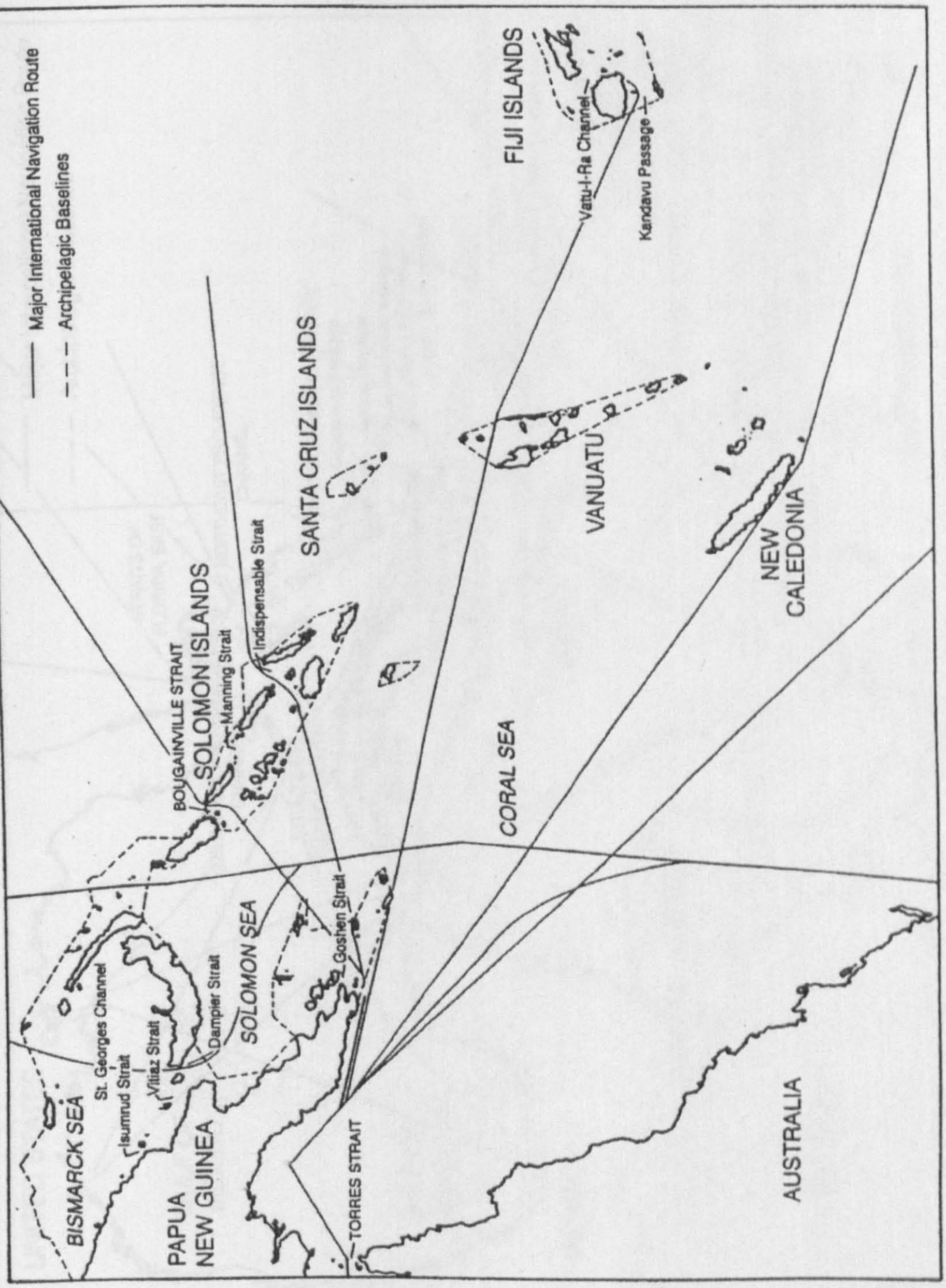

Figure 5: International Navigation Routes: Southwest Pacific

Source: L.M.Alexander, *Navigational Restrictions within the New Law of the Sea Context: Geographical Implications for the US* (offshore Consultants Inc. Peace Dale, Rhode Island, December 1986).

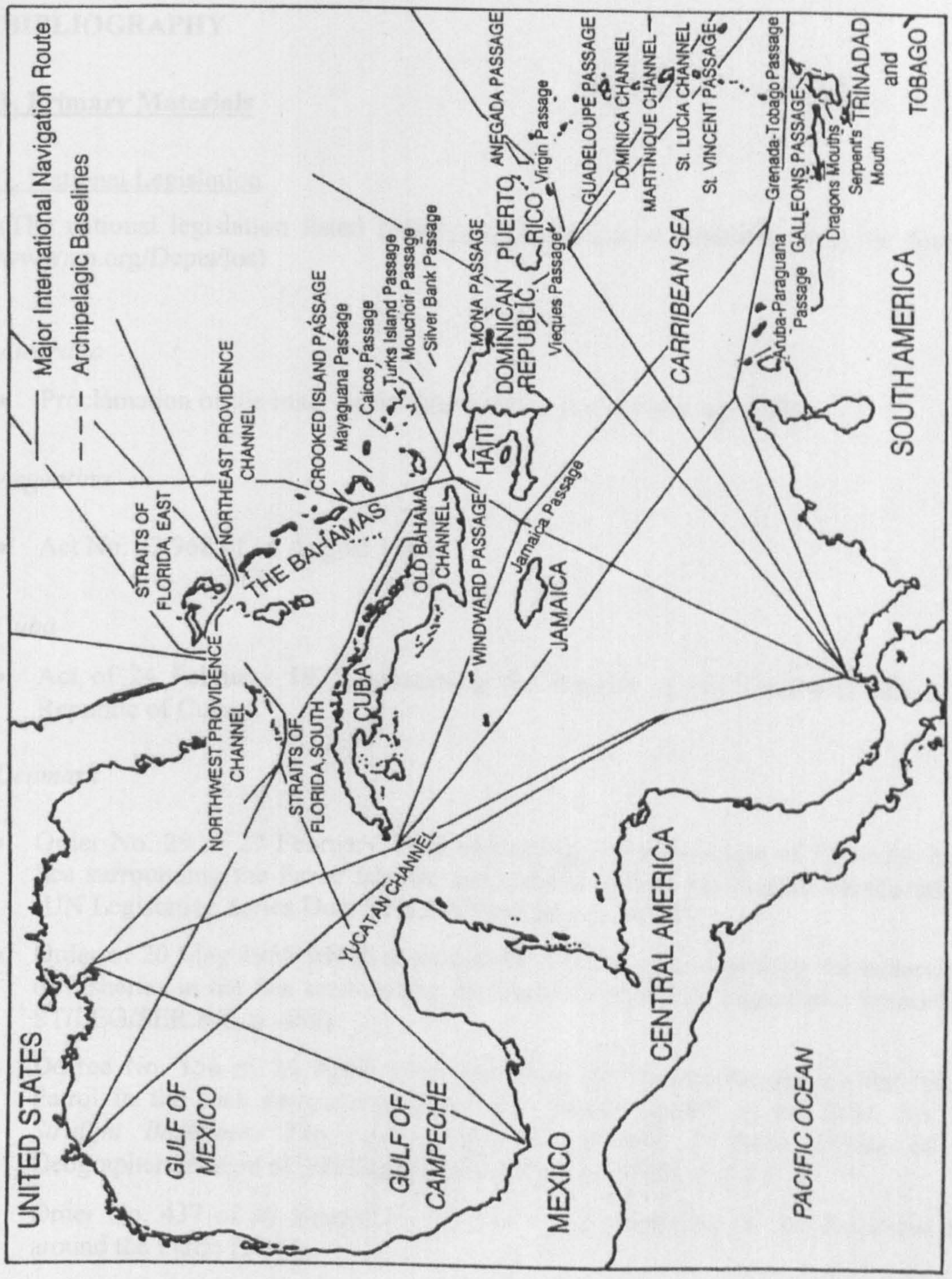

Figure 6 : International Navigation Routes : Caribbean

Source: L.M.Alexander, *Navigational Restrictions within the New Law of the Sea Context: Geographical Implications for the US* (offshore Consultants Inc. Peace Dale, Rhode Island, December 1986).

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